UNITED STATES DISTRICT COURT

DISTRICT OF PUERTO RICO

In Re:	)	Docket No. 3:17-BK-3283(LTS)
	)	
	)	PROMESA Title III
The Financial Oversight and Management Board for Puerto Rico,	)	(Jointly Administered)
as representative of	)	
The Commonwealth of Puerto Rico and the Puerto Rico Electric Power Authority,	)	June 4, 2020
Debtors,	)	

In Re:	)	Docket No. 3:17-BK-3567(LTS)
	)	
	)	PROMESA Title III
The Financial Oversight and Management Board for Puerto Rico,	)	(Jointly Administered)
as representative of	)	
The Puerto Rico Highways and Transportation Authority,	)	
Debtor.	)	

OMNIBUS HEARING

BEFORE THE HONORABLE U.S. DISTRICT JUDGE LAURA TAYLOR SWAIN

UNITED STATES DISTRICT COURT JUDGE

AND THE HONORABLE U.S. MAGISTRATE JUDGE JUDITH GAIL DEIN

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

ALL PARTIES APPEARING TELEPHONICALLY

For The Commonwealth of Puerto Rico, *et al.*:	Mr. Martin J. Bienenstock, PHV
For the Official Committee of Unsecured Creditors:	Mr. Luc A. Despins, PHV Mr. Zachary S. Zwillinger, PHV
For Ambac Assurance Corporation:	Ms. Atara Miller, PHV
For Assured Guaranty Corporation and Assured Guaranty Municipal Corporation:	Mr. Mark C. Ellenberg, PHV
For Puerto Rico Fiscal Agency and Financial Advisory Authority:	Ms. Elizabeth L. McKeen, PHV
For Bacardi International Limited and Bacardi Corporation:	Ms. Dianne Coffino, PHV

APPEARANCES, Continued:

For AmeriNational Community Services, LLC, and Cantor-Katz Collateral Monitor, LLC: Mr. Douglas S. Mintz, PHV
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I N D E X

San Juan, Puerto Rico

June 4, 2020

At or about 9:37 AM

* * *

THE COURT: All right. Then we will begin. I'd ask Ms. Tacoronte to call the case.

MS. TACORONTE: Good morning, Your Honor.

Bankruptcy case 17-3283, *In Re: The Financial Oversight and Management Board for Puerto Rico, as representative of the Commonwealth of Puerto Rico*. The Honorable Judge Laura Taylor Swain presiding. Also sitting, Honorable Magistrate Judge Judith Gail Dein.

THE COURT: Thank you.

Buenos dias. This is Judge Swain speaking. Welcome back counsel, parties in interest, and members of the public and the press. Today's telephonic hearing is a continuation of the Omnibus Hearing that began yesterday. For clarity, and for those who are joining us for the first time today, I will repeat my usual instructions regarding the hearing.

To ensure the orderly operation of today's telephonic hearing, all parties on the line must mute their phones when they are not speaking. If you are not accessing these proceedings on a computer, please be sure to select mute on both the Court Solutions dashboard and your telephone.

I remind everyone that, consistent with Court and

Judicial Conference policies and the Orders that have been issued, no recording or retransmission of the hearing is permitted by any person, including but not limited to the parties, members of the public, and the press. Violations of this rule may be punished with sanctions.

I will be calling on each speaker during these proceedings. When you speak, please start by identifying yourself by name for clarity of the record. Please do not interrupt each other or me during this hearing. If we interrupt each other, it is difficult to create an accurate transcript of the proceedings. Having said that, I apologize in advance for breaking this rule, as I may interrupt if I have questions or if you go beyond your allotted time. However, if anyone has any difficulty hearing me or another participant, please say something immediately.

The time allotments for each matter and the time allotments for each speaker are set forth in Section III of the Agenda that was filed by the Oversight Board on Monday, June 1st. That Agenda was filed at docket entry 13305 in case 17-3283 and is available to the public at no cost on Prime Clerk for those interested.

I encourage each speaker to keep track of his or her own time. The Court will also be keeping track of the time and will alert each speaker when there are two minutes remaining with one buzz, and when time is up, with two buzzes.

And here is an example of the buzz sound.

(Sound played.)

THE COURT: If your allocation is two minutes or less, you will just hear the final buzzes.

When we need to take a break, I will direct everyone to disconnect and then dial back in at a specified time. Our timing for this morning is from 9:30 to 12:45. We will take a ten minute break around 11:15, and then we will resume in the afternoon at 2:15 and go until 5:00, if necessary. The longer mid-day break is necessitated by a conflict in the Court's schedule, and so I am thankful for your patience and your understanding.

Today we are having the preliminary hearing on three motions for relief from stay relating to revenue bonds: The monoline insurers' Lift Stay Motion with respect to HTA bonds, which is docket entry 10102 in case 17-3283; the monolines' Lift Stay Motion with respect to PRIFA bonds, which is docket entry 10602 in case 17-3283; and the monolines' Lift Stay Motion with respect to CCDA bonds, which is docket entry number 10104 in case 17-3283.

We will begin with the argument relating to HTA bonds. I have 40 minutes allocated to Ms. Miller and/or Mr. Ellenberg. So which of you will be speaking first?

MR. ELLENBERG: Your Honor, this is Mark Ellenberg. I was going to start, but, as I understood your Court's

subsequent Order, all of the arguments were going to be made on behalf of movants, and then all of the arguments are going to be made on behalf of opponents. And then we were going to end with a rebuttal.

THE COURT: Yes.

MR. ELLENBERG: And so we've -- we view that as a 90-minute block, which we would allocate as follows: I would start with 30 minutes devoted to the lien and standing issues -- well, the lien issues as they relate to HTA, and the standing issues in general. Ms. Miller would then spend 45 minutes addressing preemption across all three motions and the lien issues relating to PRIFA and CCDA. And then we would reserve 15 minutes for rebuttal that we will share.

THE COURT: Very well then.

MR. ELLENBERG: So then I would start with 30 minutes, Your Honor.

THE COURT: Yes. Understood. All right then. Thank you very much for those clarifications, and we will adjust our timing mechanisms accordingly.

So, Mr. Ellenberg.

MR. ELLENBERG: Thank you, Your Honor. And if the Court please, Mark Ellenberg, counsel to Assured and speaking on behalf of all movants with respect to the lien issues in HTA and standing.

Your Honor, the excise tax statutes transfer

ownership of the pledged taxes to HTA for the benefit of the bondholders. The statutes were enacted or amended contemporaneously with each of the 1968 and 1998 bond issues, and they were enacted for the express purpose of funding the bonds.

The legislature's intent is clear: It was to enable the construction of highways for the Commonwealth for the use of the residents of the island through the pledge of tolls and excise taxes, without exposing the general credit of the Commonwealth. The pledge was the essence of the transaction. The language in the statutes themselves makes that quite clear.

And I'd ask, Your Honor, if you have handy the demonstrative package that we submitted to you?

THE COURT: I do. That is Docket Entry 13339.

MR. ELLENBERG: Yes, Your Honor.

And so pages four, five, and six of the demonstrative package have a chart which sets forth salient provisions of the tax statutes. And I will focus on the oil and gasoline tax in the far left-hand column, but -- the other statutes are not identical but to the same effect.

So if we start with 3175 --

THE COURT: That would be D-4?

MR. ELLENBERG: Yes, D-4, Your Honor.

THE COURT: D --

MR. ELLENBERG: D, as in dog.

THE COURT: Four?

MR. ELLENBERG: Yes. Excise tax statutes.

THE COURT: Yes.

MR. ELLENBERG: There should be a chart, Your Honor.

THE COURT: Yes. I have it here. It's page 14 of the PDF, the consolidated PDF.

MR. ELLENBERG: Okay. I'm --

THE COURT: There are many ways, but it's page D-4. It's headed, Excise Tax Statutes Provide that Revenues are Held --

MR. ELLENBERG: Yes. Exactly.

THE COURT: So I'm there.

MR. ELLENBERG: Okay. So let's start with subsection (A), which creates a four cent tax, which is to be covered into a special deposit in favor of the Highways and Transportation Authority for its corporate purposes, although we will see later that "for its corporate purposes" is then qualified by later positions. (A)(1)(a) tells us that the secretary shall transfer every month the amounts covered into the special deposit.

So we now know that a tax was enacted specifically to fund the repayment of these bonds, and that it was to be kept separate from the General Fund, which is the assets of the

Commonwealth, for the benefit of the Highways and Transportation Authority. And that it was to be transferred to them on a regular basis.

If we then turn to the next page, Your Honor, D-5, we see that the Highways and Transportation Authority is given the authority to commit or pledge the proceeds of the collections on the taxes. And then down at the bottom it says, unless clawback applies, the proceeds of said collection, in the amount that they be necessary, shall be used solely, shall be used solely for the payment of the principal and interest on bonds and other obligations of the Authority. So that while -- and so that while these taxes were given to HTA for its general purposes, in the event that they issue bonds, then the bondholders will have a first lien on these assets.

And how this works, Your Honor, is that there's a waterfall in the bond resolutions. And --

THE COURT: I know that -- pardon me. I just have a question before you go on. And I know that you will be talking about liens, but your position is that word -- shall be used solely is not merely a statutory direction, but is actually the imposition of a lien that would give somebody the power to enforce it as against these specific assets, even though the word "lien" isn't used here, even though the word "pledge" isn't used here?

MR. ELLENBERG: Yes, Your Honor. We believe it means two things: First, we believe that the statute as a whole, and that provision is certainly a key part of it, actually transfers the beneficial ownership of the excise taxes to HTA, and that HTA has then pledged them on through a consensual lien to the bondholders.

But in addition to that, we believe that that language is also sufficient to create a charge against the property, and that that charge satisfies the requirements for a statutory lien, which applies against the taxes in anyone's hands, including the Commonwealth.

THE COURT: Thank you.

MR. ELLENBERG: Okay. So Your Honor, I apologize for that phone ringing in the background.

Your Honor, if we then turn to page D-6, we see now that the government of Puerto Rico itself is making agreements and commitments. And it makes two of them, each one of which is very important.

So first, it agrees and commits -- agreement wasn't enough. It had to also commit not to reduce the tax that was just enacted to fund the bonds. And then it says that it will ensure that the taxes are covered into the special deposit in the name and for the benefit of HTA. In the name and for the benefit of HTA, until such bonds, issued at any time, including their interest, have been paid in full.

So, Your Honor, this language, which is critical, establishes a number of things. First, as I said, taken as a whole, the statute establishes that HTA is the beneficial owner of the designated excise taxes, which makes perfect sense, because the taxes were what was going to repay the bondholders. In fact, the bondholders only have recourse to the collateral that is pledged to them. They don't have recourse against the general credit of the Commonwealth. They don't even have recourse against the general credit of HTA. Their sole recourse is to the pledge. That was the essence of the deal. And so HTA, as the party issuing the bonds, became the beneficial owner.

Second, the statute establishes that HTA had the authority to issue bonds and to pledge the taxes.

Third, there's the requirement that the taxes be kept separate from the General Fund, not commingled with the Commonwealth assets.

Fourth, there's a requirement that they be transmitted by the Treasury to HTA on a regular basis. And then we have the two direct commitments by the Commonwealth itself.

Now, Your Honor, these are not mere contractual covenants. They're not just unsecured promises. This is the law of Puerto Rico. It was enacted by the legislature, and it was signed into law by the Governor.

This is the law. They have to obey it. It is not a mere contract. Anyone can breach a contract, whether or not they're a debtor, but you can't breach a law. For example, the Government of Puerto Rico is subject to procurement laws and regulations. Can they breach those just because they're a debtor?

You heard yesterday, with respect to PREPA, that PREB approval was necessary with respect to the contracts they wanted to assume. They're a debtor. Can they just ignore PREB? No, of course they can't. This is the law of Puerto Rico. It cannot just be ignored. And their status as a debtor gives them no greater right to ignore it than they had before. They have to follow the law.

And again, Your Honor, we have to step back and look at the entire question of what was the legislature trying to accomplish here? They are trying to accomplish the funding of highways for the Commonwealth without impacting their general credit. And the way to do that was to create streams of revenues that would secure the bonds and limit the bondholders' recourse to those revenues. That's the deal. We accept that deal. We don't want more than we were entitled to. But what we do want is the collateral that was clearly pledged to us.

Now, Your Honor, this language directly refutes a number of the arguments made by the government parties. And

let me try to go through them.

The first argument is that because the Commonwealth is not liable for the bonds, the excise taxes cannot be taken to pay for the bonds. Well, what this legislation shows is that the Commonwealth clearly understood that the excise taxes would be used to pay for the bonds. Indeed, the Commonwealth expressly commits by law that it will not diminish the taxes until the bonds are paid in full.

This means that either, one, the excise taxes are not the property of the Commonwealth, which is we believe the right answer; or two, at a minimum, that the Commonwealth agreed to guarantee the bonds to the extent of the pledged excise taxes. One of those two things must be true. Either way, the bondholders are secured by the taxes.

Now, the next argument, Your Honor, is that the statutes merely make the excise taxes available to HTA for its general corporate purposes. But as we noted, that statement was qualified by subsequent clauses. The first authorizes HTA to issue debts secured by the excise taxes, and the second is that once that debt is issued, the bondholders shall have a first lien on the excise taxes.

Now, what happens, Your Honor, is that the taxes are -- and the tolls are poured into the waterfall set up in the bond resolutions. And the first priority is to top up the various reserve funds created by those resolutions, and it is

out of those funds that principal and interest on the bonds are paid. But once all those funds are topped up, whatever falls out at the bottom of the waterfall is available to HTA for its general corporate purposes. Historically, Your Honor, about 400 million dollars a year has fallen through the bottom of the waterfall and been available to HTA for its use, including maintenance of the toll roads.

Now, Your Honor, we're seeking relief from the stay to enforce our rights under the bond resolutions. So that is our right. Our right is to have the excise taxes and the tolls poured into the waterfall to have our funds, our reserve funds topped up. And then when there's money left over, yes, HTA can have it.

We're not here to say that we are seizing the funds. We're not going to take all of them. All we want is to have the bond resolutions enforced. That's the deal we signed up for. We're happy to live with it.

The next argument, Your Honor, is that the grant of the taxes to HTA is merely conditional, and that's based on the clawback. But that's wrong. The language obligating the taxes to a special deposit for the benefit of HTA is in no way conditional. It's mandatory. There's a "shall".

Similarly, the transfer obligation isn't mandatory -- there's a "shall" there, and there's no qualification in any way whatsoever. The qualification doesn't appear until we get

down to -- until we get down to Section (A)(1)(c). And the qualification appears there only in reference to the priority lien given to the bondholders.

So effectively, the constitutional clawback is a carve-out from our lien. It is not a carve out from the transfer of ownership to HTA. And in that sense, Your Honor, it's just like the carve-out of a DIP loan. DIP lenders get liens on the assets of the debtor, but they allow a carve-out for attorneys' fees. It's standard operating procedure.

That doesn't mean they don't have a lien. It just means the lien is subject to a carve-out. Well, it's exactly the same here. Our lien is subject --

THE COURT: Okay.

MR. ELLENBERG -- to a carve-out -- I'm sorry, Your Honor. You were going to speak?

THE COURT: Yes. And so you're saying that Article VI, Section Eight does not affect, qualify, or limit in any way, what you believe the statute does, and that it is only a limitation on the consensual lien that is created by the resolutions?

MR. ELLENBERG: Well, it's a carve-out from both the consensual lien and the statutory lien. I mean, we agree that our liens are subject to clawback, be they consensual or statutory. And it is part of the statute. But what we're saying is that it does not undercut our lien. It simply is a

carve-out from our lien. It's a limitation on our lien. And it's a very conditional one.

The conditionality is not in our lien or in the transfer to HTA, the transfer of ownership to HTA. The conditionality is on the clawback. And there's zero evidence in the record that the conditions for clawback have ever been met, much less that they will be met in the future. And the only permitted use of clawback funds is to pay the GO bonds. They are not generally available to the Commonwealth for whatever use it wants to make of them.

In sum, Your Honor, you know, as we learned in our first year property courses, ownership is a bundle of sticks. It's not an all or nothing proposition. And so in this case, the Commonwealth has retained one stick, a very slender, conditional stick, which is clawback. But all the other sticks have been transferred to HTA, which has pledged them to the bondholders.

So the next argument, Your Honor, is that the Commonwealth has no privity with the bondholders, thus depriving the bondholders of recourse to the funds, and also depriving us of standing. Well, I don't know how they can say that. The statute itself has the Commonwealth making direct agreements with and commitments to the bondholders. And there are two of them. And we just looked at them. So that not only blows up their standing argument, but it severely

undercuts the whole theme of their opposition, which is that the Commonwealth is something of an innocent bystander here, who maybe made some unsecured promises but is not otherwise involved in this transaction.

The Commonwealth is at the heart of this transaction. They were the architect of it, and they absolutely understood that they were alienating the tax proceeds to fund these bonds.

So that leads us to the next argument, Your Honor, which is that the taxing power belongs to the Commonwealth and cannot be alienated. Well, Your Honor, the taxing power is not being alienated. It is the taxes collected pursuant to that taxing power that are being alienated. That happens all the time, and indeed, it happened in COFINA, in the COFINA Plan that you confirmed, and which was supported by the FOMB and the Commonwealth.

Certain of the sales and use taxes are alienated to the COFINA structure, permanently and forever. So that can happen, and it's not an alien -- an improper alienation of the taxing authority.

THE COURT: Mr. Ellen --

MR. ELLENBERG: So indeed, Your Honor --

THE COURT: Mr. Ellenberg?

MR. ELLENBERG: Yes.

THE COURT: In the statutory provisions in COFINA,

there was very explicit, express language of transfer, and also language addressing the available resources clawback issue. And no language of transfer at that level of specificity is in the Excise Tax Statute, is it?

MR. ELLENBERG: Yes, Your Honor. Well, the language is what we have. And what I'd say, Your Honor, is that the fact that over the course of 50 years, someone figured out how to make a better mousetrap, doesn't mean that the original mousetrap didn't catch mice.

Could the language of these statutes have been even stronger? Yes. But that doesn't mean that the language here is inadequate. And again, we have to view this in the context of the entire transaction.

What was the legislature intending to do? They were intending to fund the construction of highways based on the security of the tolls and the excise taxes. That's the only way the transaction worked. And so the intention to pledge them is overwhelmingly obvious. And yes, of course I agree the language could have been better.

The Commonwealth and government parties also point to subsection (G) of the statute, which never became effective, but which also contained better language. But frankly, Your Honor, that later drafted provision just confirms what the intent was all along, that the -- that the clear legislative intent here was to transfer the benefit of the taxes to HTA so

that they could be pledged to the bondholders. And that's how the bondholders were going to be repaid.

And again, I'd go back to the language of (A)(1)(d), which says that the taxes shall be covered into a special deposit in the name of and for the benefit of HTA. So I think that's pretty good language, Your Honor, and I think it makes the point pretty clearly.

So Your Honor, we not only have the plain language of the statutes to rely on, but we have a First Circuit precedent that's directly on point, which is the *Flores Galarza* case which we discuss throughout our briefs, but initially at pages 20 through 24 of our Brief in Support of the Motion. And *Flores Galarza* involved a statute that had the Commonwealth collect insurance premiums from motorists renewing their vehicle licenses in the event that they couldn't provide proof that they had private insurance. And it is, in that sense, very much like an excise tax.

And the Commonwealth was then obligated to transfer the premiums to a consortium of insurers to insurer those unable to get the private insurance. In 2000, however, the Treasury decided that it was simply going to keep the premiums to ease its own cash flow problems. Again, very reminiscent of our current situation. The Court, however, concluded that the insurance consortium had an entitlement to and a property interest in the premiums. And by contrast, the Court

concluded that the Commonwealth had no property interest in the premiums, but merely collected and held them as a custodian, trustee or agent.

Now, Your Honor, the words "custodian, trustee or agent" didn't appear in the statute. The word "transfer" didn't appear in the statute. The word "lien" didn't appear in the statute. But it was clear to the Court that the government was simply acting as a collection agent. And that's exactly what's going on here.

The government is a collection agent for the taxes, much in the way that a mortgage lender is a collection agent after it sells the mortgage to Freddie Mac or Fannie Mae. They no longer have a beneficial ownership interest in the funds. They're just collecting them on behalf of HTA and the bondholders.

THE COURT: Now, the money in *Flores Galarza* was paid by private individuals as premiums for a particular purpose under a statutory scheme that said that the insurance was to be provided by the entity that I think was in the plaintiff position in *Flores Galarza*, or given back, and so there was -- it seems to me at least factually different in the sense that it is not a revenue premised on something else that the government is collecting and then you're asserting dedicating to a particular purpose.

So coming in, there was no general Commonwealth

purpose for these premiums in *Flores Galarza*, and there was another entity that was set up as being entitled to them in the first place. And that's a factual distinction. Does it make a legal difference from your point of view?

MR. ELLENBERG: Absolutely not, Your Honor. And, well, what's going on here? Private individuals pay the excise taxes, and they do it when they renew their automobile license or when they consume certain petroleum products. And those taxes, paid by private people in connection with an activity, are then collected by the government, which has committed to transfer them to HTA, another entity, which earned them when it issued five billion dollars worth of bonds secured by those revenues. And the bondholders certainly earned them when they forked over five billion dollars on the expectation that those pledged revenue streams would be used to repay them.

So I think the fact that one was a payment made in connection with renewing your license for insurance, and the others are payments made in connection with consumption of various products, you know, is a distinction absolutely without a difference. And the parallels are overwhelming.

THE COURT: To your knowledge, are there any excise taxes that are presently at HTA?

MR. ELLENBERG: Well, Your Honor, a hundred million dollars a year is -- has been transferred since 2017 from the

Treasury single account to HTA. And we believe at a minimum, we certainly have received those taxes.

THE COURT: Thank you.

MR. ELLENBERG: And that's exactly where I was going next, Your Honor, because we not only have the taxes in *Flores Galarza* -- we have not only the statutes in *Flores Galarza* to rely on, but we have the way in which the excise taxes were treated by the government historically.

So first and foremost, those taxes were never put into the Commonwealth General Fund budget. They were never in that budget. There was never an appropriation as to them. They've always been kept separate from that budget and appeared instead in the HTA budget, where they are labeled as HTA's own funds.

Moreover, Your Honor, in the government's official accounting system, they created a fund called Fund 278, which has specific subaccounts that are dedicated to HTA. And every dollar of these excise taxes is tracked into those subaccounts and it's tracked out of those subaccounts. And this is precisely the type of special deposit that the excise tax statutes required and with -- how the Commonwealth historically complied with its obligations under these statutes.

Moreover, HTA had the authority to remove the funds from the subaccount. And in Demonstrative 15, we have an

example of an SC-735 voucher, where HTA's signature was adequate to withdraw the funds. Now, the government parties make much of the fact that there's also a Treasury signature on that document, but that Treasury signature is simply ministerial. And so, Your Honor, if the -- if HTA didn't receive the taxes ab initio when the tax statutes were enacted and transferred ownership to them, they certainly received them when the Commonwealth collected them as its agent. And if they didn't receive them when the Commonwealth collected them as an agent, then they certainly received them when they were covered in two -- Fund 278.

And finally, as I mentioned, Your Honor, a hundred million dollars a year has been transferred to HTA from the Treasury single account, and certainly that should be subject to our liens. And those -- those funds were received.

Now, Your Honor, the official statements are also completely consistent with everything I've been saying. Another data point in how we should read these statutes. And I'm surprised that the government parties dispute this and even suggest otherwise. But the official statements make clear that the excise taxes are pledged to the bondholders. They make clear that the Treasury is obligated to keep the excise taxes separate from the general funds. They make clear that the pledged taxes are subject to clawback, but only if no other resources are available. And they further state that

clawback has never occurred in the history of the Constitution.

On the other hand, and unlike the *ERS* case, the official statements do not warn of appropriation risk, nor do they warn of bankruptcy or insolvency risk. The only risk factor contained in the official statements is that the excise taxes and tolls themselves may not be sufficient to service the bonds. That is the risk we signed up for. It is a risk that has never occurred. As I said, at least four hundred million a year in excise taxes and tolls are collected. But that is the risk we took. We did not take the risk that the government would just decide to keep the funds.

So, Your Honor, I think when you put all those pieces of evidence together, our reading of the statute is clearly corroborated. But to the extent Your Honor doesn't conclude there's ownership, then there is clearly a statutory lien, as I've discussed.

THE COURT: If you could just wind up.

MR. ELLENBERG: Yes, Your Honor.

And so finally, I would just say that we haven't talked about the HTA level yet, but we did have consensual liens granted to us there under the bond resolutions, that clearly 601 is the operative provision, not 401. And we go through that at length in our briefs.

And thus, at the HTA level, we have valid and

perfected consensual liens on both the tolls, toll receivables and on the excise taxes. And that's -- Your Honor, when you put the entire package together, we clearly have liens on the taxes and the tolls, and that should ultimately entitle us to relief from the stay to enforce those rights.

THE COURT: Thank you, Mr. Ellenberg.

And so now we'll turn to Ms. Miller. And we'll set the clock at 45 minutes again. And the timekeeper, I'm sure, has made a note of what little overage we had with Mr. Ellenberg. And we'll circle back to that when we compute what's left for with rebuttal.

MS. MILLER: Thank you, Your Honor. Good morning. Atara Miller for Milbank on behalf of Ambac, and speaking today for all of the other movants as well.

As Mr. Ellenberg indicated, I'm going to start by speaking about preemption, but before I do, I just want to respond or add to Mr. Ellenberg's response to Your Honor's question about the *Flores Galarza* case and whether the idea of initial ownership matters. And I just would refer the Court to *In re City of Columbia Falls*. And in that case, the question before the court was whether a special assessment that was collected by the municipality for a specific purpose was held in trust by the municipality.

And it was held there that it was being held in a trust capacity; that the municipality acts in a pure

ministerial role as a custodian. And in that case, those were tax assessments, special assessment taxes, which just like HTA and all of the other taxes, originated in ownership with the municipality there and the Commonwealth here.

The Oversight Board's only response to this case is that ultimately, in that case, the Court held that Chapter 9 modified that obligation. But Chapter 9 modified the obligation because the obligation to transfer this special assessment was only to pay the deficiency, and if the bonds were retired, there was no deficiency. So it didn't address at all this fundamental question of whether or not, when a statute sets up a sum like this with similar language, it results in a trust for the benefit of the entities for which purpose it was intended to be used.

So with that, I'd like to address the Oversight Board's preemption arguments. And I'll note at the outset that AAFAF does not join in them, which we think is significant. And as this Court is aware, AAFAF actually vehemently disagrees with the arguments being advanced by the Oversight Board here.

And the Oversight Board clarified in its sur-reply briefs that it's not suggesting that PROMESA preempt any unsecured claim or property interest, but simply that, as they explained in the CCDA sur-reply, "Territorial law cannot force the Commonwealth to use retained revenues for debt

service."

Given that this preliminary hearing is limited to secured status and standing, and the Oversight Board's acknowledgment that its preemption argument does not impact whatever security interest or -- even an unsecured claim movant may have here, this issue is simply not ripe today, and the Court doesn't need to reach preemption at all.

I'm going to, nonetheless, briefly address the substance of their arguments. And the Oversight Board has really articulated three separate series of preemption, and Your Honor noted two at the Omnibus Hearing yesterday. The first is that the Commonwealth is always free to disregard the law, because one legislature can't bind another. The second, that the Oversight Board's Title II budgetary powers preempt bondholders' rights. And third, that the Title III restructuring process preempts certain rights.

I'm going to address the first, which is what I call the nonentrenchment, or is known as the nonentrenchment principle. And the Oversight Board's argument that the government statutes are mere appropriations and that the Commonwealth can -- and I'm going to quote their language -- change its mind every minute if it chooses to do so, was unequivocally rejected by the Supreme Court over 150 years ago, and has consistently been reaffirmed since, as noted in the Supreme Court case, *Missouri versus Jenkins* in 1990.

In the *Von Hoffman* case from 1886, the Supreme Court expressly considered and rejected the argument that laws, and in particular taxing laws, passed by one legislature cannot bind a subsequent legislature. It held, and I'm going to quote the language from the case, "It is clear that where a statute has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation in such cases are equally bound. The power given becomes the trust which the donor cannot annul and which the donee is bound to execute."

The structure issue in that case is exactly the same as the one that we have here. These are from appropriation statutes.

THE COURT: Ms. Miller.

MS. MILLER: Yes, Your Honor.

THE COURT: I just have a question. *Von Hoffman* seems to me to reach its result via a finding of the violation of the Contract Clause of the Constitution and the remedy of the mandamus and specific performance. *Von Hoffman* doesn't deal with the issues of reasonableness and necessity that are elements of current Contract Clause jurisprudence, and so -- and those issues obviously weren't raised in that case.

Do those issues complicate or have implications for

the nonentrenchment principle in the current legal jurisprudential structure, if you will?

MS. MILLER: So I would say, you know, at a theoretical level, I think the answer is no. But at a minimum, it would require a determination and a -- you know, evidence and a finding that there were, in fact, such circumstances that warranted that. And that certainly, first of all, hasn't been briefed, but it is also something that would have to be briefed in a substantive action, not on a Lift Stay.

THE COURT: Yes. Thank you.

MS. MILLER: You're welcome.

And just because Your Honor raised the Contract Clause issue in the -- or the Contract Clause element of the holding of *Von Hoffman*, I want to also highlight the fact that this is -- really becomes an issue, I think, to the extent that the Oversight Board's argument is that either the budgets themselves are changing the law, and so you don't even need preemption, or as support for the reasonableness of Title II preemption.

The appropriation status of these statutes doesn't feed into Title III preemption. And so to the extent that there's a Contracts Clause issue, we would say that the fiscal plan and the budgets violate the Contracts Clause. And as Your Honor has previously held now twice, to the extent that

we want to challenge the fiscal plan and budget on the grounds that it's violating the Contracts Clause, or the Constitution, such challenges would not be barred by 106(e).

So I'm going to turn now to discuss the Title II preemption argument where the Oversight Board essentially says that Title II preempted any Commonwealth law that provides for the distribution of money, other than as provided for in the certified fiscal plan or budget.

This week's Supreme Court decision in the *Aurelius* case makes claim the fiscal plan and budgets themselves can't preempt anything. The Oversight Board's members are merely local officials. They don't exercise federal law-making power, and their budgets are acts of the Commonwealth, not federal law. The preemption, if it exists at all, has to be based specifically on a conflict with the provisions of PROMESA under Section Four.

The Oversight Board seems to argue that all Commonwealth laws obligating the payment or transfer of money were immediately preempted the moment PROMESA was enacted. The plain text of PROMESA indicates that this is not what Congress intended. PROMESA was enacted against the backdrop of the clawback of revenues from HTA, CCDA, and PRIFA. Congress included numerous provisions to roll back Commonwealth laws purporting to direct the clawback of revenues from those entities, including expressly preempting

certain Commonwealth laws and executive orders directing particular use of the funds.

The Section 303(3), which I know we have discussed at length in other cases, is a bespoke edition to the Chapter 9 corollary in PROMESA, and it expressly preempts unlawful executive orders that diverted funds from territorial instrumentalities, i.e., changed the way monies were to be spent.

Well, every law and executive order, whether lawful or not, directing the use of funds was immediately preempted upon enactment of PROMESA by Section Four. This provision would have been unnecessary. And if their argument is that the preemption doesn't come into effect until there's a conflicting budget, we would posit that that's not federal preemption because the budget isn't federal.

But we would also say that you wouldn't have needed to expressly preempt anything. You could have just given the Oversight Board carte blanche to rewrite the spending as they wanted to. And there's no suggestion that's in PROMESA, that all spending, regardless of Commonwealth law, is at the discretion of the Oversight Board.

Section 201(b)(1)(N) we think further supports this, which requires the fiscal plan to respect the relative lawful priorities, lawful liens that are in laws in effect prior to the date of the enactment. So clearly, there's no intention

to just undermine all of the laws that the Oversight Board is suggesting are simply preempted.

So the Oversight Board relies, of course, very heavily on this argument and the First Circuit's decision in *Vazquez Garced*. The decision there merely held that the Governor can't override the Board's budgeting process to approve future spending commitments after the enactment of PROMESA. It nowhere addressed the question of whether the fiscal plan could or did preempt pre-existing legal obligations that were created before PROMESA.

And if you think about it, you know, also, *Vazquez Garced* was really focusing on a procedural aspect, right? So it was saying, does the Puerto Rico law which sets the process and allows the Governor to reprogram funds that were not spent in a prior fiscal year, does that process still stand or is it preempted by the complex budgeting and fiscal planning process that was set out in PROMESA?

And there it seems that there's a clear conflict with the act itself, which is what Section Four preempts. It doesn't preempt anything that's inconsistent with the act or any actions taken hereunder.

Okay. So I'm going to turn now to their Title III preemption argument, where the Oversight Board argues that Title III of PROMESA doesn't recognize any priority other than an administrative priority, and thereby preempts movants'

claims. So despite Mr. Bienenstock's statements yesterday, this theory would apply equally to the GO bondholders. If the obligation to transfer money under the revenue bond statutes is a preempted priority, then the GO priority is as well. There is simply no such thing as selective preemption.

The Oversight Board's efforts to avoid the application of any rulings by this Court to the GO bonds simply highlights that the Proposed Plan is nothing more than the Board picking winners and losers. That issue is not before the Court today, but the fact that the Board is pressing this aspect of preemption and multiple fora against the revenue bondholders, while at the same time desperately trying to avoid adjudication of the very same legal questions against the GO bondholders, is both telling and an indication of the strength of this argument.

With respect to the revenue bondholders, this argument fails on the merits. Title III addresses only the treatment of claims in a Plan of Adjustment. It does not abstractly preempt rights or reprioritize claims. There's no plan here and, therefore, the Court need not rule on any question regarding priorities in connection with this Lift Stay Motion. Moreover, administrative priority relates only to unsecured claims, not the secured claims asserted by movants here, which PROMESA expressly recognizes and preserves.

In any event, it would be inappropriate for this Court to rule on the issue today under the First Circuit's decision in *Grella* and the District of Puerto Rico's decision in *In re Henderson*. The question of priority is expressly not before the Court on a lift stay motion, and the Oversight Board's Title III preemption argument addresses only the preemption of priorities.

So unless Your Honor has any questions on priority, I'd like to turn now to PRIFA.

THE COURT: You may go on to the next point. Thank you.

MS. MILLER: Thank you.

So, Your Honor, there are hundreds of pages of briefings, and mounds and mounds of spaghetti that have fallen off the wall.

THE COURT: And the --

MS. MILLER: And if you cut through all of that, the Oversight Board's -- which I'm going to try to do, and keep it simple this morning. The Oversight Board's argument boils down to two basic points: First, that the rum taxes belong to the Commonwealth, which is free to transfer them or not at its whim. And second, the bondholders have no interest in the revenues until they are physically deposited into the trust account. They're wrong on both points.

The Oversight Board's first argument requires one to

accept that sophisticated commercial lenders and insurers extended billions of dollars of credit to PRIFA for the benefit of the Commonwealth based on nothing more than a promise by the Commonwealth that it would transfer money to PRIFA, and an illusory one at that.

According to the Oversight Board, the Commonwealth, at all times, retained full ownership and control over the rum taxes until it chose to send them to PRIFA, and was free at any time to change the law and nullify even that apparent promise to transfer the money. Thankfully, the trillion dollar domestic revenue bond market -- the law is not in accord.

As we already discussed, the Supreme Court long ago held that statutes authorizing an instrumentality to issue bonds and pledge tax revenues to support those bonds cannot simply be repealed or amended. These are not mere appropriation statutes. And here, as added security, the Commonwealth directly pledged to PRIFA bondholders that it would not interfere with any of the rights granted to PRIFA under the statute.

I now want to address the second argument. It's clear that PRIFA's bondholder liens extend to revenues in the infrastructure fund. The Oversight Board's restrictive definition of our lien defies logic and is contrary to the plain language of the Trust Agreement. Limiting the liens to

monies in the Sinking Fund means that PRIFA bondholders are not secured by any PRIFA account, or any money at all until PRIFA actually pays the Trustee what it owes on the bond.

Of course the entire point of a lien is to have security in the event that the debtor does not pay. So it's commonplace, it's belt and suspenders to include trust accounts within the scope of the lien. But here, the Board would have you believe that the bondholders only got those belts and suspenders. No pants.

The Oversight Board nowhere explains why the trust agreement 24 times references pledge or pledge to bondholders, including defining the collateral as pledged revenues, when the pledge didn't grant the Trustee any more rights than it got under the Trust Agreement without it. According to the Oversight Board, PRIFA didn't grant the Trustee a security interest in any PRIFA property or account. This irrational position, which the Oversight Board has contended for well over a year now, resolves this motion as a matter of law, is based on a plain misreading of the definition of pledged revenues.

So, Your Honor, if you have the demonstratives that we submitted in connection with the PRIFA Lift Stay, which are ECF1334-1 --

THE COURT: Yes. Let me just turn to that. Yes. Which page?

MS. MILLER: Page two of the deck indicated on the bottom right.

THE COURT: If you can just give me a chance to scroll up to that. If you will give me a moment.

So just -- we'll stop the time on the clock maybe.

MS. MILLER: Thank you, Your Honor.

THE COURT: Does it say -- okay. Slide deck. I've reviewed the cover sheet and now I am --

MS. MILLER: It's actually the first page of the document. Exactly.

THE COURT: Yes. The Trust Agreement grants the Trustee a lien?

MS. MILLER: Exactly. And it incorporates the relevant definition, put together in one place.

THE COURT: All right. I'm there. Thank you.

MS. MILLER: You're welcome.

So we tried on this flag to just put all of the relevant definitions that are incorporated into the pledge, so that we don't have to flip pages back and forth. So the pledge is included in page nine of the Trust Agreement, and it provides that PRIFA has pledged and does hereby pledge to the Trustee the pledged revenues as defined herein. And the Oversight Board -- and then the definition of pledged revenues is, in turn, defined as, "shall mean the special tax revenues, defined term, and any other monies that have been deposited to

the credit of the Sinking Fund."

The Oversight Board's entire theory rests on its reading of this provision, to have deposited to the credit of the Sinking Fund, qualified -- both special tax revenues and any other monies that have been deposited. This has the effect of making a portion of the definition entirely superfluous. And this is evidenced by actually the Over -- the way the Oversight Board uses the term multiple times in its own brief.

So I included a couple of examples on slide four where the Oversight Board says things like, pledged revenues are defined as, "Monies that have been deposited to the credit of the Sinking Fund." Well, slide two has the definition, and it has me saying, but what about the special tax revenues? And their brief is right. If you re-deposited to the credit of the Sinking Fund, you don't need special tax revenues at all. In fact, you probably don't even need the defined term included in the Trust Agreement at all.

So this reading is contrary to the well-accepted, last antecedent canon principle. And the Supreme Court in *Barnhart v. Thomas*, from 2003, discussed this provision, and specifically in connection with a provision from the Social Security Act that included the same language, "any other," right?

So to the extent that you would say, well, "other"

tells me that it has to modify back, they specifically said any other. And what the Supreme Court explained in that case, and kind of a memorable example of a teenage house party and parents absent, which makes me, as a parent, a little bit frightened, it makes the simple point which applies exactly here, which is that you would expect that when you have a list of two things, and the first thing is something that is quite specific that everybody knows, but the second is a very broad, general term, you would be qualifying the very broad, general term.

So, for example, here pledged revenues could never mean special tax revenues and any other monies. That would not be the scope of the lien. You had to qualify any other monies, but the first very specific provision didn't need to be qualified. And so it's not -- it would be improper to read the qualifying language as qualifying anything other than the last provision.

The Oversight Board actually cited to the Circuit Court decision, which was -- held to the contrary and was expressly overturned on this point by the Supreme Court. So not only is it precluded, it would make -- render a portion meaningless and would be contrary to basic grammatical principles. But under the Oversight Board's arguments that they've raised, PRIFA actually couldn't even grant a lien on the Sinking Fund because PRIFA doesn't own it.

The Sinking Fund is a trust account that's legally owned by the Trustee for the benefit of the bondholders. So yet another reason why it would be irrational to limit the lien to something that PRIFA -- that the Oversight Board at least argues PRIFA could not grant the lien in.

But the Oversight Board's counter to our position is that the lien -- to our position that the lien extends to the Infrastructure Fund is that Section 401 of the Trust Agreement precludes PRIFA from granting any liens on the infrastructure fund. Section 401 was plainly added as -- to protect bondholders, and we believe it was intended to mean only that PRIFA couldn't grant any additional liens on the property that was already being pledged.

But most fundamentally, the pledge is the pledge. Section 401 is a restriction on PRIFA's activities. It's a covenant. It doesn't -- it cannot redefine the pledge. And so at most what we have here is a breach of a covenant, which maybe is the right result since it seems very clearly to have been unartfully worded.

There were also numerous other provisions of that paragraph in particular, Section 401, which were not complied with, including the -- PRIFA withdrawing amounts and making deposits itself into the Sinking Fund. I think there's no dispute now that these monies, even when they were flowing, were not ever held in a PRIFA bank account, and PRIFA was

never actually withdrawing the money or making deposits. So at most, this means that some portion of Section 401 was breached.

The Commonwealth agreements with the rum producers also demonstrate that, prior to this litigation, the Commonwealth didn't believe that its lien was so limited. And so on slides seven and eight of the slide deck, I've included brief excerpts from the Bacardi and Serralles agreements.

And you'll see that in Section 4.6.1 of the Bacardi Agreement, on slide seven, the Oversight Board said that, "The first 117 million dollars of cover over revenues received by the government in each fiscal year through fiscal 2057 are pledged and have to be transferred to PRIFA for deposit to the credit of the Infrastructure Fund."

That's exactly what we contend the Enabling Act and the bond documents accomplished. And the Lockbox Agreement itself preserves the structure and continues to have the first 117 million dollars in each fiscal year deposited to the credit of PRIFA. And that's reflected on slide nine of the deck.

So this shows that, as a pure matter of law, the bondholders lien is not limited to money in the Sinking Fund. And we would contend that -- and that it extends to monies in the Infrastructure Fund. We would contend that the monies are currently being covered into the Infrastructure Fund.

Under the Lockbox Agreement, Citibank transfers and deposits the first 117 million dollars each year to the Secretary of the Treasury for deposit to the credit of PRIFA. And that -- a sample of that distribution detail that goes with the transfer is included on slide 18.

The transfers continue in this manner to this day. And once deposited with the Commonwealth, the monies are deposited to the credit of the Infrastructure Fund. "Deposited to the credit of" does not require it to be deposited into a specific bank account.

The Lockbox Agreement itself makes clear that the Commonwealth knows well the difference between monies being in -- credited to, or designated for deposit in a bank account. And the language from that is on slide nine of the deck.

The government parties have a lot to say about what the Infrastructure Fund is not, but they never actually affirmatively say what it is. Our position, however, is clear. As required by the Enabling Act and as disclosed in the audited financial statements, the Infrastructure Fund is a special fund, meaning an accounting designation rather than a bank account, used to record the first 117 million dollars of annual excise tax revenues.

The actual dollars are held in a TSA bank account, but are specifically designated and tracked PRIFA monies. At no time was there any other account in which the 117 million

dollars required by the Enabling Act to be deposited to the credit of the Infrastructure Fund held. And that's even prior to the withholding.

The Oversight Board disputes our contention that the monies are currently being deposited to the credit of the Infrastructure Fund. This is a purely factual dispute, which is not ripe or appropriate for resolution at this juncture, particularly on a limited record.

Movants have presented at least three pieces of evidence to support their colorable claim that the Infrastructure Fund is a fund maintained for accounting purposes with monies corresponding to the revenues therein currently held in the TSA account. First, the corporate -- Commonwealth corporate representative testified that the Infrastructure Fund isn't a single bank account or fund, but generally refers to the first 117 million dollars of rum taxes earned each year.

Two, the disbursement detail from the Lockbox account, and evidence showing that the first 117 million are, in fact, being credited to account R4220 and Fund 111 to this day. Three, the Commonwealth audited financials, which publicly disclose the PRIFA fund as a special revenue fund used to account for monies received by the Commonwealth up to 117 million of certain federal excise taxes levied on rum and other articles. And I note that the Commonwealth cites to the

most recent Commonwealth audited financials, and those deviate significantly in the language from the prior financial statements and were only issued years after this litigation began. And they clearly reflect the Commonwealth litigation position and don't say anything about what is, in fact, happening.

The fact that the 117 million dollars required to be deposited in the Infrastructure Fund was only ever held in the TSA account further supports our position. And the Oversight Board's argument to the contrary rests on its assertion without any evidence that the Infrastructure Fund may have been a combination of bank accounts. And I can get into detail on that, but I'm going to spare the Court for now. I think it's set out in our brief.

THE COURT: I understand your overall point that their position on what the infrastructure is, is unclear and speculative.

MS. MILLER: Right. Thank you, Your Honor.

THE COURT: Thank you.

MS. MILLER: So one more thing. The Oversight Board included in its excerpt of the statute for this hearing, Section 1918 of the Enabling Act, and it was nowhere cited previously. And we would contend, for good reason, we think it's entirely irrelevant to this inquiry.

Section 1918 addresses only the money that's actually

being held by PRIFA. They already mentioned, there's no dispute that the Infrastructure Fund is an accounting designation. And as the Commonwealth corporate representative testified many, many times, monies are not deposited in funds. They are accounting designations. And there's a difference between accounting and cash. And as the -- it's also clear that it doesn't apply because Section 1918 requires PRIFA to hold the cash in its possession in bank accounts in its name, and Section 1914, which is on slide 11. But it's the provision that obligates the transfer, confirms that the Infrastructure Fund can be maintained by or on behalf of PRIFA. And so, clearly, 1914 and the transfers of the Infrastructure Fund are not subject to 1918.

So I'm going to turn -- because I'm running out of time, I'm going to turn now to CCDA, and then I'll circle back to additional open questions -- open issues, unless Your Honor has specific questions on PRIFA.

THE COURT: That's fine. Please proceed.

MS. MILLER: Okay. So, Your Honor, CCDA is different, and that's why I left it for last. And, for purposes of this motion, simpler than the other revenue bonds, because the hotel taxes never actually touch a Commonwealth account. And that's why we're not seeking to bring a suit against the Commonwealth at all with respect to these revenues.

The CCDA bonds are governed by a suite of statutes and agreements, which are described briefly on slide two of the deck. And the CCDA demonstrative deck is ECF 133 -- 13338-1.

THE COURT: I have that demonstrative, and I am now turning to the section of it that says, CCDA demonstrative. And I have found your cover sheet for the demonstrative.

MS. MILLER: Okay. Great. Thank you.

Okay. So we included, just because I know that I, over the past many months, have found myself sort of having trouble to keep all of the agreements that govern and structure this deal clear in my mind, we put them together. So there are two statutes, the CCDA Enabling Act, the hotel occupancy taxes, and then four, but really three, interrelated agreements: The Assignment and Coordination Agreement, the Pledge Agreement, and then the two Trust Agreements.

The Tourism Company -- so the Hotel Tax Occupancy Act gave the Tourism Company the power to impose, collect, and use hotel occupancy taxes. The Tourism Company keeps all of the taxes collected, and spends them for its own corporate purposes. The Oversight Board misleadingly cites to the statement of motives to suggest that the Tourism Company is acting in a "ministerial capacity" as a collection agent for the Commonwealth.

So the statement of motives, what the statement of

motives actually says -- and I'm going to read the whole sentence for you. In order to continue with the development of the tourism industry in our island, it is essential that the Tourism Company exercise a more prominent role in the collection and supervision of what represents one of its principal sources of revenue so that it may continue with its ministerial role to promote Puerto Rico as the premier tourism destination in the Caribbean. Clearly, the other kind of ministerial role.

It is undisputed that the Tourism Company does not round trip the revenues back to the Commonwealth, as confirmed by the various flow of funds documents prepared by the government parties in this litigation, and the Oversight Board's Sur-reply, at page one, stating that the Tourism Company, "Retains them in its own accounts." Only the Tourism Company must approve the pledge of the hotel taxes, and the Commonwealth has no corresponding right. Neither the Tourism Company nor CCDA is a Title III debtor.

This motion highlights the extreme behavior being endorsed or imposed by the Oversight Board under the guise of fairness. It is the ultimate gotcha scenario in which even nondebtors can avoid obligations and benefit from the automatic stay of -- simply ignoring our obligations and just not transferring money into trust accounts.

If they don't -- just don't transfer the money, then

they can avoid their debt obligation, leaving bondholders with rights only against an empty box, or so the Commonwealth says. The Commonwealth argues that it has an interest in the hotel taxes sufficient to preclude bondholders from exercising their rights against CCDA and the Tourism Company, either because of its inherent taxing power or by virtue of its residual interest arising from the clawback right.

We disagree with these arguments, as explained in our brief. And I'm happy to address them further if you have specific questions, but I want to hold them to the end because we submit that this motion should be granted, even if the funds are, in fact, subject to the automatic stay.

So first, bondholders have -- are the beneficial owners of the monies from the time they're collected, because they're restricted and can only be used as required under the statutes and bond documents for the ultimate distribution to bondholders. Notable here is the detailed Commonwealth covenants, which include the affirmative obligation to make sure that the amounts that must be deposited are deposited, in addition to the pledge not to also eliminate the taxes or parties' rights.

We think that, generally, the cases that the Commonwealth cites with respect to negative covenants are inapplicable here, frankly. They deal with promises not to -- when a bank lends you money and you own a home, issue a

mortgage on another -- another mortgage senior to their debt. On that, we just think that those have nothing to do with what we're talking about here, where the Commonwealth is giving you an asset and then promises that it won't not give you that asset. So essentially, even the negative covenants are double negative covenants, so they are affirmative covenants.

But the Commonwealth here just cites the same string cite of cases, and doesn't even address the fact that there is a clear, affirmative and direct obligation of the Commonwealth itself. And the Commonwealth also agrees to be bound and to comply with all of the applicable bond documents. But even if Your Honor doesn't agree that the bondholders are the beneficial owner of the property, such that the Commonwealth lacks any equity in the funds and makes them definitionally unnecessary for a restructuring, there's no dispute that the bondholders have a lien on the revenues deposited in the transfer account, which we contend is still happening.

The arguments here center on a factual dispute about which bank account is the transfer account. The factual dispute, as in PRIFA, should be decided in the underlying action and not on this motion. The Court is not charged with definitively resolving the issues, particularly not on the limited record, but instead has to determine whether movants have demonstrated a plausible claim to the property, or said in the converse, whether the Oversight Board has demonstrated,

based on the evidence, that we have no plausible basis to suggest that we have a claim.

The Oversight Board's arguments for why Scotiabank -- the Scotiabank's 5142 account -- and I'm going to refer to some of the bank accounts, so let me just find this slide so I don't lose you.

So if you look at slide 11 in the deck, this is the flow of funds, a slightly modified version of the flow of funds, only by adding the red writing that was produced to us in litigation.

THE COURT: Yes. So this is the one that is headed January 2015 to November 2015?

MS. MILLER: Exactly.

THE COURT: One of the things that I have in -- unfortunately to do, working with two screens here, is to click the wrong screen and put something back. But I'm back there. I'm good. Thanks for your patience.

MS. MILLER: Okay. You're welcome. So we're all set?

THE COURT: Yes.

MS. MILLER: Okay. Thank you, Your Honor.

The Oversight Board's argument -- so you see that on this, if you look at slide 11, there's -- the monies are collected by the hoteliers, and then they're transferred into the Scotiabank 5412 account, which is the Tourism Company

account. And that's the account that we contend is the transfer account. It then, during this period, got moved into the GDB 9758 account, which is the account that the Oversight Board contends is the transfer account. So just so you have that sort of clear in your mind.

THE COURT: I do understand those positions. Thank you.

MS. MILLER: Thank you. They do -- potentially in material ways, but potentially not.

So the Oversight Board's arguments for why the Scotiabank 5142 account is not the transfer account are based on pure speculation, or arguments that would also defeat their arguments about which bank account corresponds to which account identified in the relevant documents.

For example, if the Oversight Board is correct that the Scotiabank 5142 cannot be the transfer account because it was opened in 2011, which is a fact not supported by the evidence, including the documents that they cite in their Sur-reply, then the Scotiabank 5144 account, which is the one designated with the yellow star to the right, which is the account that the Oversight Board contends is the surplus account, also can't be the surplus account, because that account was also opened, as the Oversight Board admits, years after the agreement.

It's more logical to assume that both Scotiabank

accounts are successor accounts to accounts that were previously established. And nothing in the bond documents or otherwise restricts the transfer account to being a single bank account that can never change. That's particularly, I mean, relevant here where you're talking about deals that stand, you know, 50 years.

There is no affirmative evidence identifying any account as the transfer account. The Oversight Board's assertion about which one is based purely -- is the transfer account is based purely on inadmissible hearsay. Their witness testified that he spoke to someone else who said that it was the transfer account, but he has no idea and hasn't seen any documents that support that.

The Oversight Board's theory also requires the Court to ignore the affirmative evidence we do have regarding the GDB 9758 account, describing it as the rum tax concentration surplus account, and the lack of any evidence at all identifying the Scotiabank 5144 account as the surplus account.

The Oversight Board argues that the Court should ignore the labels attached to the accounts and consider instead how the accounts were used to conclude which account is the transfer account. Again, the Court should not be making factual conclusions on the Lift Stay motion. But second, the flow of funds doesn't support the Oversight

Board's theory any more than it does ours.

Key facts are omitted in their demonstrative, which are reflected on slide 11, that defeat their assertion. First, there are outflows. Their witness testified that there are outflows from the GDB 9758 account, which would be consistent with it being the surplus account but not consistent with it being the transfer account.

And they also don't identify the fact that the Scotiabank 5144 account is a commingled account that holds monies that are entirely unrelated to the tax revenues. There's no -- they give no explanation for why you would have a commingled account that is part of the Special Holding Fund, which has particular accounting requirements attached to it, why you would want to subject other monies, or why it would even be appropriate to subject other monies to that.

The Enabling Act contemplates that the Tourism Company will transfer the money to the GDB for deposit into the pledge account every month, not that the money is already being held in a GDB account. And to the extent the Oversight Board wants to argue, well, that just means in a GDB held account, and the GDB 9758 account is a Tourism Company account, the evidence would show that -- and this is Hughes' Declaration, Exhibit 43, which I apologize is not in the demonstrative at CCDA_stay0006785, just so the cite is on the record, that the agency, the depository agency and the agency

listed on that account is actually CCDA, not the GDB. The Oversight Board, as -- its third account into the flow, that's nowhere described or mentioned, is the GDB 9758 account. It's the surplus account, as stated in the official Tourism Company and GDB records.

Then predefault, the monies flowed through only accounts identified in the relevant documents. The transfer account, the surplus account, the pledge account, and the bond payment fund. AAFAF did not provide any flow of funds information predating January 2015, so honestly, we just don't know whether the flow of monies into the GDB 9758 account always happened from the time these bonds were issued or whether it was a later change to help ameliorate the GDB's dire liquidity position in later years.

Sending all of the monies to the GDB surplus account daily, rather than directly to the pledge account monthly, would have allowed the GDB to benefit from the float on the funds. We don't have affirmative evidence, but it's just as likely as any of the Oversight Board's theories.

The Oversight Board argues that the GDB 9758 account can't be the surplus account because the monies flow in and out of the account subject to movants' lien, causing the lien to attach and detach. This just misunderstands our lien, which is not a lien on a deposit account. That's why I don't need a deposit control agreement. But it's a lien on the flow

of funds, and once it attaches, it doesn't matter what bank account or what you do with it, the lien, they're always subject to the lien.

Even -- I just want to, in my last minute, say that even if the Oversight Board were right about which account is the transfer account, movants still have a lien on the monies in the Scotiabank 5142 account. And this is because, at slide three, there is the grant, and the Tourism Company expressly agreed to be bound by all of the agreements, and passed a corporate resolution, so they're equally bound by the Pledge Agreement.

And it includes in the collateral, one, the hotel occupancy tax revenues, which mean the monies deposited in the transfer account; two, the monies deposited in, or required to be deposited in the pledge account pursuant to the provisions of the pledge agreement.

Now, they say, well, that doesn't extend -- that doesn't give you anything other than monies in the transfer account. And so the Oversight Board's argument is that 2-B, the pledge in 2-B gave me a security interest in, one, money in the transfer account, and then two, money in the pledge account or money in the transfer account.

Well, that doesn't seem to be a logical reading of the provision, and nothing indicates that the words "or obligated to be transferred into" means -- refers only to the

directly preceding transfer. And, in fact, you know, the nature of this agreement, and the deal, and the fact that they're all interrelated agreements makes pretty clear that it logically refers to the monies that had to be transferred in from the beginning of the flow. If at any time they had to get to the pledge account, then they're included in the pledge.

And this is -- this is clear when you look at the pledge agreement on slide four. For example, Section 5-B requires the GDB -- do you want me to just finish the sentence -- to put -- to diligently enforce its rights under the assignment agreement, including enforcement of the Tourism Company's obligation to transfer the hotel occupancy taxes into the transfer fund.

THE COURT: And I had promised that -- I had taken a minute or so to fiddle around, so if you have something else you want to state quickly, you may.

MS. MILLER: Okay. So I just wanted to touch briefly on the delegation of taxing authority and Your Honor's question with respect to PRIFA -- sorry, with respect to COFINA, and isn't the language there more clear. You know, again, like Mr. Ellenberg said, delegation is a proper exercise. And the reliance, as I noted on the statement of motives, is not to the contrary. Actually, I think it supports our facts by indicating that they are Tourism Company

revenues. But also, this case is entirely distinguishable from COFINA.

In COFINA, you had taxes, sales and use taxes, which were being collected by the Commonwealth. And it was only a fraction, a small slice of that revenue stream. You know, one slice goes to the municipalities, one slice goes to COFINA, the rest of it goes to the Commonwealth. You had to make clear in that -- because COFINA lacked all of the indicia of ownership.

The same isn't true here. Once you gave the Tourism Company the authority to impose the tax and collect it, and to use it as it sees fit, and to pledge it where the Commonwealth doesn't need to and consent to that, you don't need to expressly say, and I'm giving you ownership. Nobody would ever think -- and that is why these monies in the cash restriction analysis are actually being held by the Tourism Company in a debt service reserve fund to this day.

And the Oversight Board indicated that those -- designated those funds, as restricted in its class restriction analysis, and ones that the Oversight Board doesn't have access to, because it can't reduce appropriations to CC -- to the Tourism Company to basically, you know, make CCDA spend -- part of the Tourism Company, spend its money on hand rather than through appropriations.

So I just wanted to respond to Your Honor's question

on that as well.

THE COURT: Thank you very much.

MS. MILLER: Thank you, Your Honor.

THE COURT: And so this concludes the movants' opening arguments, and I think that this is an appropriate time for our ten-minute break. After the break, we'll come back and hear from the DRA parties, and then the objecting parties, and then rebuttal.

So I'm going to -- we are starting a ten-minute break now. Please everybody hang up and then dial back in in ten minutes. Thank you.

MS. MILLER: Your Honor, I was reminded just before we take a break, as a housekeeping matter, we would like to move into evidence the exhibits that were submitted in ECF 13339-2, 13338-2 and 13341-2.

THE COURT: Is there any objection?

(No response.)

THE COURT: Hearing none -- I'm sorry. Is that an objection?

(No response.)

THE COURT: No. Okay. So hearing none, the exhibits in the enumerated docket entries are received into evidence.

So the ten minutes starts from now.

MR. BIENENSTOCK: Your Honor, this is Martin Bienenstock. I apologize. I was trying to get off mute. I

forgot I was asked to mute my phone on the dashboard.

THE COURT: All right.

MR. BIENENSTOCK: So I unmuted my phone but --

THE COURT: All right.

MR. BIENENSTOCK: We absolutely object. This was oral argument. We'd want to go through -- we have all kinds of problems with their exhibits, their deposition questions, et cetera. This was supposed to be oral argument, not an evidentiary hearing, and we do object to admitting what Ms. Miller asked to be put into evidence.

And offhand, I mean, it was so quick, I don't even know what exhibits she's talking about, but we definitely object.

THE COURT: Well, Mr. Bienenstock does make a good point that we have oral argument, and the things that were submitted with the various original submissions and that have been highlighted here are part of the record on this Lift Stay proceeding at this point. So I'm not sure that it is necessary for me to receive into evidence matters that have been put up for my consideration in connection with this preliminary hearing.

Ms. Miller.

MS. MILLER: Your Honor, we actually spent days exchanging lists of the exhibits that we wanted included as part of the record. They are the exhibits that were attached

to the various briefs, plus just a couple of supplemental documents.

The Oversight Board actually gave us their objections, including a number which were based on hearsay. We agreed, as reflected in the submitted materials. We addressed all of their objections to their satisfaction, including making clear that we weren't relying on certain documents for the truth of the matter. I'm just not sure -- the idea that I'm springing this on them is false.

We, for a long time, went back and forth. And frankly, if the Oversight Board had a fundamental objection to this, they should have and could have articulated it earlier. I mean, I'm not sure what the practical difference is other than from our perspective, having a clean record of, you know, what are the factual documents that are being considered by the Court in connection with these motions.

THE COURT: Well, lest we take another hour here trying to look independently through PDFs, I will take Ms. Miller's request under advisement. The materials that have been filed are part of the court record at this point.

And I would ask that you meet and confer, and as promptly as possible, give me a joint letter on your positions as to whether it's necessary to receive things in evidence. And to the extent one side or the other believes that things should be received, and the other believes there are preserved

objections to that, lay that position out. And let's say that joint report must be filed by a week from now. But it should also apply to anything that the Oversight Board would be trying to introduce that the movants would object to.

So that is by June 11th, you will file a joint status report, all right?

MR. BIENENSTOCK: Thank you, Judge.

MS. MILLER: Thank you, Your Honor.

THE COURT: Okay. Thank you.

Now, talk to you in ten minutes. 11:20, by my clock.

(At 11:11 AM, recess taken.)

(At 11:20 AM, proceedings reconvened.)

MS. NG: Okay, Judge.

THE COURT: Yes.

MS. NG: Things are pretty much okay. I think everyone's on who's supposed to be on. Let me just check. I think mostly counsel are on.

THE COURT: Do you have there Ms. Miller, Mr. Ellenberg, Mr. Mintz, Mr. Zouairabani, Mr. Bienenstock, Ms. McKeen?

MR. BIENENSTOCK: Yes, Judge. This is Martin Bienenstock.

MS. NG: Yes. I don't see Ms. Miller yet. I do see Mr. Ellenberg on.

MR. ELLENBERG: Yes, I'm on. Can you hear me?

MS. NG: Yes, I can hear you.

MR. ELLENBERG: Great. Thank you.

MS. MILLER: I'm on as well. It's Ms. Miller.

THE COURT: Ms. Miller is on. Okay. Very good. We're just trying to check. Ms. Ng has the screen that shows who's on.

So I want to make sure that everyone who is arguing is on. So actually, I'll also do this just by asking you to respond "present" or not.

Mr. Mintz, are you present?

MR. MINTZ: Yes. Good morning, Your Honor. This is Doug Mintz.

THE COURT: Good morning.

Mr. Zouairabani.

MR. ZOUAIRABANI: Yes, Your Honor. Present. Good morning.

THE COURT: Good morning.

Mr. Bienenstock, you said you're here?

MR. BIENENSTOCK: Yes, Your Honor.

THE COURT: Good morning again.

Ms. McKeen?

MS. MCKEEN: Yes, Your Honor. I'm here.

THE COURT: Good morning.

Mr. Despins?

MS. NG: He's on.

MR. DESPINS: Yes, Your Honor. Good morning. I was muted. Sorry.

THE COURT: Good morning. I'm sorry. I know the muting is complicated, and so I will wait for you to unmute yourselves a little longer than I did with Mr. Bienenstock earlier. And thank you for doing that double muting thing.

And Mr. Zwillinger, are you on?

MR. ZWILLINGER: Yes. Good morning.

THE COURT: Good morning.

Ms. Coffino, are you on?

MS. COFFINO: Yes, Your Honor. Good morning.

THE COURT: Good morning.

All right. I think all are present and accounted for. And so we will now --

MS. NG: Judge?

THE COURT: Yes.

MS. NG: I'm sorry to bother you one more time. I need to remind everybody to please, when you're not speaking, to mute your phone and your computer, because I still see people are not muted. Okay.

Sorry, Judge.

THE COURT: Thank you, Ms. Ng.

And Counsel, please do comply so we don't have random noises from people's houses.

So with that, I will turn now to the argument for the

DRA parties in connection with the HTA Lift Stay Motion. I have a ten-minute time allocation. Who will be speaking?

MR. MINTZ: Good morning, Your Honor. It's Doug Mintz of -- excuse me. Good morning. It's Doug Mintz of Orrick on behalf of Cantor-Katz. I will be speaking for five minutes, and then Mr. Zouairabani will be speaking for five minutes.

THE COURT: Very well, then. So Mr. Mintz, please proceed.

MR. MINTZ: Thank you, Your Honor.

In accordance with Judge Dein's March 3rd Order, the DRA parties were prohibited from taking discovery, and we reserve all our rights with respect to our Lift Stay Motion and lien until we've had a full opportunity to address them. But as I said a moment ago, this is Doug Mintz. I'm here for Cantor-Katz on behalf of the DRA parties. And Mr. Zouairabani is here from McConnell Valdes for AmeriNat as well.

We've briefed a handful of issues, and today we want to focus on just two. I'll address the preemption, whether PROMESA can preempt our lien, and Mr. Zouairabani will address whether the excise tax statutes, Act 31 and 30, create appropriations.

With respect to preemption, PROMESA cannot and does not extinguish the DRA's liens on and rights to the Act 30 and 31 revenues, whether through preemption or otherwise. The

Oversight Board argues they aren't preempting the liens, but rather just the revenue streams, by drawing away the collateral itself. The impact is the same under the law. Doing so would be inconsistent with the Constitution, policy and applicable statutes and case law.

The Oversight Board has taken the view that PROMESA, largely through the budgeting and fiscal plan process, preempts significant chunks of Commonwealth law. This Court has already rejected the Oversight Board's view, stating that the Oversight Board has not been given the power to affirmatively legislate.

Thus, with respect to policy measures that would require appeal or modification of existing Commonwealth law, the Oversight Board has only budgetary tools and negotiations. Nevertheless, the Oversight Board pushes ahead again here, placing its faith in Section Four of PROMESA, which states that the provisions of PROMESA preempt specific provisions of territory law that are inconsistent with PROMESA. But the plain language of Section Four makes clear that Congress intended PROMESA to supplement, not supplant, territorial law.

The Oversight Board asserts that Congress expressly preempted Acts 30 and 31 through the budget and fiscal plan processes delineated in Sections 201 and 202 of PROMESA. They state that because the Oversight Board never certified fiscal plans and budgets providing for the appropriations required

under Acts 30 and 31, and because enforcing those statutes would, "make it impossible for the Oversight Board to restructure the Commonwealth debt and fulfill its mandate, the excise tax statutes, therefore, are preempted."

This argument is unavailing. Their argument would create significant policy concerns about PROMESA. Property rights are expressly protected under both the Fifth Amendment of the U.S. Constitution and the Puerto Rico Constitution. The Supreme Court has held repeatedly that, "However great the Nation's need, private property shall not be thus taken, even for a wholly public use, without just compensation." That's Justice Brandeis in *Radford*, 295 U.S., at 602.

The fact that enforcements of Acts 30 and 31 are inconvenient to our restructuring does not give the Oversight Board or Congress the ability to write property rights out of existence when it suits them. That would create an array of problems that are not before the Court today.

But if the law was intended to supercede the Fifth Amendment, is PROMESA even valid? While the Oversight Board wonders about the ability to confirm the Plan under the current statute, the Court should also consider a world where Congress permits determination of valid liens without just compensation. The Court would fair better to follow the Supreme Court's lead and assume that Congress did not expressly violate the Fifth Amendment in the absence of an

express statement of Congress, citing to *U.S. v. Security Industrial Bank*, 459 U.S. 70.

The Oversight Board further suggests that Congress may somehow extinguish the revenue source of the appropriations behind the lien, but preserve the property rights in the lien. They argue that this Court and the First Circuit have found that all appropriations not expressly included in the Oversight Board's budget are preempted, but that's a wildly overbroad reading of this Court and Judge Kayatta's prior opinions, which talk about whether a governor can spend outside the budget. It also turns on the meaning of appropriations, which Mr. Zouairabani will address shortly.

In any event, extinguishing the funding source of those revenues without providing adequate replacement value nullifies the value of the DRA's interest in the excise tax statutes -- the excise tax statute revenues and amounts to a taking just the same. See *Armstrong v. U.S.*, 364 U.S. 40, at 48.

And finally, a close look at the statute, as Ms. Miller noted, reveals that Congress did not intend to preempt applicable Commonwealth law here. For instance, Section 201(b)(1)(N) provides that any fiscal plan must respect the priorities, and also the liens, of the Commonwealth. Therefore, it's clear Congress intended, as

you'd expect, to preserve the DRA's property rights and revenue streams behind them.

So with that, I will turn things over to Mr. Zouairabani to discuss the meaning of appropriations.

THE COURT: Thank you very much.

Mr. Zouairabani.

MR. ZOUAIRABANI TRINIDAD: Thank you, Your Honor. Good morning. Attorney Nayuan Zouairabani from McConnell Valdes on behalf of AmeriNat.

Before we delve into the appropriations discussion, we'd like to clarify two points regarding the lien issues in the HTA motion. First, the various positions as to the extent and validity of the monolines' lien have already been outlined in our papers, and I will not repeat them.

Second, it is important to distinguish that the liens in controversy at this juncture are the monolines', and the controversy on whether HTA presented a lien over the excise tax statutes has not been raised in these proceedings and are not among the issues before the Court for adjudication. With these two clarifications, we move on to the topic of appropriations.

Your Honor, the FOMB is relying on the presumption that the excise tax statutes, including Acts 30 and 31, are both belonging to the Commonwealth, which the Commonwealth "appropriate" to HTA. However, the FOMB has never supported

this presumption, other than implying that it is common sense, and that any other interpretation would make it impossible for them to restructure the Commonwealth debts and fulfill its mandates.

As explained in our briefs, appropriations with legitimate authorization to address that, from the state treasury, to dispense for a specific purpose or project, only funds that are available in the state treasury and under the legislature's control for purposes of annual budgeting may be subject to appropriations. This concept has not only been adopted in the United States. It has been expressly incorporated as part of the federal budgeting scheme.

Now, while the Puerto Rico Constitution does not define appropriation, Sections Six and Seven of Article VI provide us with a guideline on how they work. That is, appropriations are set in the Commonwealth budget in a fiscal year by fiscal year basis.

With this framework in mind, we turn to the structure of Acts 30 and 31. These provide that, number one, revenues shall be covered into a special deposit for the benefit of HTA. Two, they were created for the specific purpose of particular creditors of HTA. And three, the Commonwealth does not have the authority to divert them to the General Fund.

As Mr. Ellenberg explained, the only extraordinary exception is when there's a valid clawback. To date, no court

has addressed whether a clawback has been properly activated by the Commonwealth. And in any event, the only use of the clawback funds is for payment of GO bonds. It is not for the Commonwealth General Fund and use. And two, solely for a particular period of time. It is not perpetual.

Acts 30 and 31 revenues are, thus, not appropriations, because, by the statute's own terms, they do not flow into the Commonwealth's General Fund and are not subject to annual budgetary allocations in the Commonwealth's budget. To this, the FOMB relies on the First Circuit's decisions in *Vazquez Garced* and *Andalusian*. However, the facts that they state are wholly inapplicable to Acts 30 and 31.

Vazquez Garced involves the reprogramming of budget extensions from prior fiscal years, while *Andalusian* involves a statute that specifically required annual funding of mandatory contributions to the retirement system. Both of these decisions revolve around controversies over particular items and the annual Commonwealth budget that requires specific budgetary allocations, whereas Acts 30 and 31 do not contain any such requirement.

The FOMB's reliance on a 2005 opinion of the Puerto Rico Secretary of Justice to the effect that the Excise Tax Statute creates a "standing appropriation" also falls flat, because, as explained by the Puerto Rico Supreme Court in *In*

Re: Secretary of Justice, AGR opinions 955, the opinions of the Secretary of Justice do not in any way bind the Court.

In conclusion, the FOMB has failed to show why Acts 30 and 31 should be treated as appropriations. Therefore, the Act 30 and 31 revenues cannot be modified through the budgetary certification process, because they are not Commonwealth funds and are not subject to annual budgetary appropriations.

The Puerto Rico legislature knows how to create appropriation statutes. In fact, we have listed a number of such statutes in our briefs. If the legislature wanted to subject Act 30 and 31 revenues to annual budgetary appropriations, it could have categorically stated so, but they did not. By now reclaiming these revenues as "appropriations" and diverting them to certified budgets, the FOMB is effectively repealing Acts 30 and 31, which authority the FOMB does not possess, as specifically dictated by this Court and affirmed by the First Circuit.

And with that, Your Honor, I'll leave it at that unless the Court has any questions.

THE COURT: Thank you very much. I have no questions for you.

MR. ZOUAIRABANI TRINIDAD: Thank you, Your Honor.

THE COURT: So now we will turn to the objecting parties, beginning with the Oversight Board, to which I have

an allocation of 60 minutes and Mr. Bienenstock identified as the speaker.

Mr. Bienenstock?

MR. BIENENSTOCK: Yes, Your Honor. Good morning.

THE COURT: Good morning.

MR. BIENENSTOCK: And we have separate allocations for AAFAF, I believe.

THE COURT: Yes. What I have is 60 minutes for the Oversight Board, 15 minutes for AAFAF, ten minutes for the UCC, and five minutes for Bacardi.

MR. BIENENSTOCK: Okay. Thank you. Thank you. Well, good morning. Martin Bienenstock with Proskauer Rose, LLP, for the Oversight Board, as Title III representative of the Commonwealth. And once again, Your Honor, the Board and myself would like to wish everyone good health and hope that we're all back together soon, and in San Juan.

My argument intends to start with principles applicable to all of HTA, PRIFA and CCDA, and then to address certain unique aspects of each entity's transactions with the bondholders. In explaining some of the general principles, however, I have to use some specific examples from the three entities.

Before addressing the substance, I want to make clear what the Oversight Board believes is the standard of proof today. The Court has directed the litigants to address

standing and property interests. The Oversight Board submits the monolines must prove a reasonable likelihood of prevailing on the issue that the Commonwealth does not have a property interest in a revenue stream before the Court can rule no stay relief is required in the Commonwealth's Title III case.

Monolines have proffered two contrary positions to that burden of proof. First, they contend they only need to establish a colorable claim. As Ms. Miller said a few moments ago, a plausible claim. The monolines adopt the colorable claim standard from the First Circuit's *Grella* opinion, but in what I will show is a recurring theme in their legal and factual assertions, they omit the First Circuit's explanation of what it means by colorable.

What the First Circuit ruled at 42 F.3d, page 34, is, "Put another way, in employing the preliminary injunction analogy discussed above, a creditor must show a reasonable likelihood that it has a meritorious claim, and the court may consider any defenses or counterclaims that bear on whether this reasonable likelihood exists."

Just parenthetically, Your Honor, I would say among those defenses and counterclaims is preemption. We disagree with the movants that preemption is not an issue today.

Second, the monolines' PRIFA sur-sur-reply argues in paragraph one, "That the Oversight Board found it necessary to respond at length in sur-reply briefing to movants' legal and

factual arguments is proof positive that movants have demonstrated a colorable claim to the pledged rum tax."

I will not waste time repeating the proposition that a litigant's reply to lengthy briefs based on new accounting arguments means the moving party must have a colorable claim. It refutes itself.

Now to the substance. Your Honor, the old proverb that a chain is as strong as its weakest link sums up the key issue in each of the three bond transactions. In a nutshell, the Oversight Board contends that the Commonwealth's pre-PROMESA statutory obligation to appropriate or transfer certain revenue streams from itself, by or through the Tourism Company, to HTA, PRIFA and CCDA, is at most a prepetition unsecured obligation that can and must be breached in the Commonwealth's Title III case.

Two venerable legal principles supported by common sense and logic compel that result. First, every state and territory in the United States has laws requiring entities to honor their contracts and their statutory obligations, including obligations to pay debt. Until now, no one would even question that these contracts and laws are subject to rejection or breach in bankruptcy where contractual obligations are impaired, debt is discharged, and the debtor pays the amounts required by the bankruptcy law. The supremacy of the bankruptcy law over local law through

preemption mandates that result. Otherwise, there can be no bankruptcy.

The monolines have provided no reason why the Puerto Rico statutes requiring the Commonwealth to transfer or appropriate revenue streams to its instrumentalities can and must be specifically enforceable and nondischargeable, while the Commonwealth's promises to pay its own debt are not. An unsecured obligation is an unsecured obligation, whether it is an obligation -- whether it is an obligation to pay or an obligation to transfer.

Now, in *Ohio v. Kovacs*, 469 U.S. 274, at page 279, the United States Supreme Court ruled that bankruptcy discharges claims regardless of their origin in contract or statute. It said, "It makes little sense to assert that because the cleanup order was entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes. Furthermore, it is apparent that Congress desired a broad definition of a 'claim' and knew how to limit the application of a provision to contracts when it desired to do so."

Your Honor, I just want to mention hypo -- or parenthetically, that contrary to some of the arguments earlier, if you look at many of the movants' briefs, including their latest PRIFA Sur-sur-reply Brief just a week ago, they say at paragraph 23, "And under settled law, statutory

contracts, such as the statutory covenant between the Commonwealth and PRIFA bondholders in the PRIFA Enabling Act are no different." And in the context, it's no different than claims, non-statutory claims.

Second, the Commonwealth --

THE COURT: Mr. Bienenstock.

MR. BIENENSTOCK: Yes.

THE COURT: It seems to me that these arguments on your side and the arguments on the monoline side just proceed from very different fundamental assumptions. The monolines' arguments say that these -- what you characterize as unsecured contracts should and are actually transfers of property rights. And you say that they're not.

If they're not, your argument that they're an unsecured claim that can be affected by bankruptcy makes perfect sense. If they are security arrangements, you have the problem that debtors have with secured claims in bankruptcy.

And so I'll hear this as your, you know, introduction to a deeper dive on why they're wrong on reading the statutes and the agreements the way they do. It seems to me that would be wise for me --

MR. BIENENSTOCK: Sure. Your Honor, I -- although I think I get to that in a little more depth a little later on in my argument, I'd like to offer the following just right now

in response while it's fresh in mind.

I think Your Honor's questions early in the morning to Mr. Ellenberg really provided the answer, which is in the statutes he's referring to, there's no words of pledging or granting a lien. So whereas I totally agree that if something is preempted that is a secured property interest somehow, there has to be adequate compensation under the Fifth Amendment.

But if there's a statute that creates an undertaking to transfer, and let's -- as I just said earlier, in this case, we have obligations of the Commonwealth to transfer money to instrumentalities. We have promises of the Commonwealth to pay the, for instance, General Obligation bondholders.

Both are obligations to transfer money. Neither one is secured. Just as clearly as the obligation, the promise to pay the bondholders is unsecured and it's preempted and it's breached, the obligation to transfer money to instrumentalities is unsecured.

And here, it would lead to a completely absurd result if it were not, but we don't have to go that far because I think it's clear. But the absurd result that would occur is the -- I'm going to get to this in a minute. The instrumentality bondholders would be paid in full.

The obligations to transfer money to

instrumentalities would be treated as nondischargeable, specifically enforceable obligations, notwithstanding that Title III doesn't have any nondischargeable claims and doesn't provide for any specific performance.

And that would leave virtually nothing for the creditors the Commonwealth promised to pay, the GO creditors and all the other creditors. So, I mean, that's the essence of our answer.

If there is -- if there are words that create a security interest, that's one thing, a Fifth Amendment rights to the adequate compensation. But if there are promises to move money, that's just an unsecured claim, and the Fifth Amendment is not invoked.

THE COURT: Thank you.

MR. BIENENSTOCK: The Commonwealth obligation would be if it's treated -- or the Commonwealth's appropriation obligations would be treated contrary to the equality policy under which creditors of the same rank share losses equally.

Instead, the Commonwealth obligation would be treated as a nondischargeable, specifically enforceable obligation to transfer billions to HTA, PRIFA and CCDA, pay their bondholders in full, while the Commonwealth's own creditors, including the GO bondholders, would absorb all the losses and possibly be paid nothing.

It is very important to recognize the obvious here.

Namely, it is outside bankruptcy that the law generally requires every entity to keep all its promises, and equitable remedies, such as equitable ownership and trust, are sometimes ordered to compel entities to honor their obligations.

Indeed, Article I, Section 10, of the U.S. Constitution bars states from enacting legislation impairing contractual obligations. Article II, Section Seven, of the Puerto Rico Constitution does the same. That's because the U.S. Constitution reserved to federal law the power to authorize impairment of contractual obligations.

So inside federal bankruptcy, the worst thing a debtor can do is to keep one promise, such as the promise to transfer revenues to the three entities here, while breaking all other promises. In bankruptcy, the equality policy requires a debtor to break all its unsecured promises so everyone shares the losses equally.

In opposition, the monolines' claim is best typified at paragraph two of their PRIFA motion dated January 31, 2020. And I won't read the whole thing, but in that paragraph they claim that, in exchange for buying the bonds, and the Commonwealth promising not to impair PRIFA's rights, and, you know, the Commonwealth's promise to maintain the appropriations, that they claim the Commonwealth alienated all of its ownership rights over those revenues, while at the same time disclaiming any liability for PRIFA's debt.

As the quid pro quo for the nonrecourse nature of the debt, PRIFA bondholders were granted an immediate protected lien on the tax revenue stream until the bonds were paid in full. In other words, they say PRIFA is the equitable owner of the rum taxes, and its bondholders have a perfected lien against them. What they say is the facts and the legal outcome, we say is simply their desire, but nothing more than their desire, completely refuted by what the documents say.

There are several reasons why the monolines' claims that the Commonwealth alienated all its ownership rights, that PRIFA, HTA and CCDA are the equitable owners, and that the bondholders have a perfected lien on the revenues are wrong. First, each of the three deals expressly renders the revenue stream subject to the Commonwealth's retention or clawback rights. Monolines do not deny that fact. Rather, they now contend in paragraph three of the CCDA sur-sur-reply that the clawback rights do not provide the Commonwealth a property interest, because they are solely for the benefit of the GO debtholders and not the Commonwealth.

The Puerto Rico Constitution refutes the monolines' contention. It only allows clawback and retention in respect of available revenues of the Commonwealth. Article VI, Section Two, paragraph three of the Puerto Rico Constitution provides the Secretary of the Treasury may be required to apply the available revenues, including surplus, to payment of

interests on public debt. Section Eight provides when available revenues, including surplus, are insufficient, the public debt and amortization thereof shall first be paid. This is paid from available resources of the Commonwealth, and each of these three deals expressly provides a carve-out for that.

So it's almost impossible to dispute that the monies they're talking about are not, at least on a contingent reversionary basis, available resources of the Commonwealth. That's the property interest. And here, this is more than speculative or hypothetical. The currently proposed Plan of Adjustment takes that money and uses it to pay the GO debtholders, none of whom are paid in full under the Proposed Plan.

Moreover, the revenue -- the revenues come unencumbered, thereby providing the Commonwealth equity in them for purposes of Bankruptcy Code Section 362(d)(2)(A). That's very significant, because there are many arguments here where the movants say, well, even if you have a right, you're under water for purposes of (d)(2)(A). But we have the revenues back lien free, so we have to have equity in them and (d)(2)(A) can't be satisfied.

Second, this Court already determined, in the context of the monolines' request and HTA revenues and the reserve account, that HTA had a minimum -- had at a minimum, a

contingent reversionary beneficial interest. That was at 582 B.L.R., at pages 598 and 599. The Commonwealth's clawback rights provided a reversionary interest as well that was not so contingent given that none of the GO debt would be paid in full under the Proposed Plan of Adjustment.

The monolines' claims are also wrong because of the following undisputed facts. The Commonwealth is not party to any security agreement with bondholders. The Commonwealth has disclaimed liability on all the bonds. There is no financing statement filed naming the Commonwealth as a debtor by any of the movants or their bond trustees. There is no agreement under which the Commonwealth transfers equitable ownership or any ownership of the revenue streams to its instrumentalities or to any bondholders or trustees. Bondholders do not have control over any of the Commonwealth's deposit accounts.

None of the official statements suggested that the Commonwealth was liable on the bonds, that any of the Commonwealth's funds were pledged to bondholders, that any statutory liens existed, or that any trust in favor of the bondholders had been created. None of the attorneys' opinions mention these rights either. I will address the monolines' reasons why none of the foregoing matters in a few minutes.

Third, as we spelled out in our briefs, all pre-PROMESA appropriations are preempted by PROMESA, as we believe this Court and the First Circuit have already held.

Additionally, one legislature cannot bind a future legislature to make a particular appropriation or not to repeal any tax, thus, this applies to all three situations.

I will address now the monolines' arguments. First, in at least their PRIFA and HTA Sur-sur-replies, and now today in their argument, the monolines cite *Von Hoffman v. Quincy* and *Missouri v. Jenkins* for the proposition that once a legal obligation is incurred pursuant to legislative authorization, the government cannot avoid it by simply failing to appropriate a disbursement of funds to pay the obligation.

Under well-settled law, reaffirmed by the Supreme Court they say, if the government says it's a tax and incurs a debt obligation, but does not perform the ministerial appropriation, the aggrieved party can sue to mandate the tax proceeds to be used in accordance with the pledge.

And they describe *Von Hoffman* as follows: "The power given becomes a trust which the debtor cannot annul and which the donee is bound to execute." That's -- when I said that this is their description, it's their quotation from *Von Hoffman*, which ends with a semicolon.

The rest of the sentence that they didn't include has what Your Honor raised, that the reason for that ruling was because it would impair contractual obligations. And, Your Honor, I was a little worried that you stole my thunder, and you stole part of it. In hindsight, I wish you stole all of

it. But I want to go further than the prior colloquy went.

One would never expect a litigant to write in its brief that it should lose and its adversary should win, but by citing *Von Hoffman* and cutting off its quotation mid sentence, that is exactly what the monolines have done, albeit unintentional. The portion of the sentence the monolines cut off says that neither the state nor the corporation can any more impair the obligation of the contract in this way than any other.

When the Contract Clause has arisen in these Title III cases, it's been creditors asserting that the Commonwealth's moratorium acts and similar acts impaired their contractual obligations. It was never a matter of claiming Title III impaired their contractual obligations.

Von Hoffman was a case outside bankruptcy, when there was no permanent bankruptcy law, where the Supreme Court was barring the state from impairing a contractual obligation. It was a Contract Clause case having no application in Title III, where the Contract Clause does not apply, or we wouldn't be here.

The bottom line is that the monolines haven't cited *Von Hoffman* as their legal authority -- that the monolines haven't cited *Von Hoffman* as their legal authority means they have no authority that is applicable. But the monoline citation of *Von Hoffman* also shows they acknowledge the

Commonwealth has the power not to appropriate the rum tax to PRIFA. They cite *Von Hoffman* to say the Commonwealth is barred from exercising that power. *Von Hoffman* would have no application in the monolines' brief if the Commonwealth had no ownership and control of the rum taxes in the first place, because then it wouldn't be able to retain them.

The monolines' request for the Court to apply *Von Hoffman* and stop the Commonwealth from refusing to appropriate rum taxes to PRIFA is the crux of this dispute and has a clear answer. No one, including the monolines, have asserted the Commonwealth or any debtor cannot breach its promises to pay. Not paying is the essence of bankruptcy.

Here the monolines are contending that while the Commonwealth can breach its promises to pay its GO debt and other debt, it cannot breach its promise to appropriate rum taxes to PRIFA. There is no statutory or logical basis for such a distinction.

The monolines' HTA Sur-sur-reply Brief also cites *Missouri v. Jenkins*, but that gets them nowhere, simply collects cases consistent with *Von Hoffman*, such as *Louisiana v. City of New Orleans*, which the monolines cite, but again, do not disclose as a Contracts Clause case. That Court opined at 215 U.S. 175-6, "a number of decisions in this Court have settled the law to be that where a municipal corporation is authorized to contract and to exercise the power of local

taxation to meet its contractual engagements, this power must continue until the contract is satisfied." And that, it is an impairment of an obligation in contract to destroy or lessen the means by which it can be enforced.

Second, they assert the statutes at issue are not appropriations. There are many reasons why it doesn't matter, and in any event, they are wrong. First, as I already explained above, any obligation to pay money or transfer money is preempted in bankruptcy. It doesn't have to be an appropriation obligation.

Bankruptcy impairs all obligations, not just obligations arising from appropriations. Specifically, Title III does not make any prepetition obligation nondischargeable, and that includes appropriation obligations and nonappropriation obligations.

Second, movants claim the use of the word asignacion, and I'm sorry if I mispronounced it, and the HTA -- for revenue statutes is different from an appropriation, but the English definition of that word is appropriation. Moreover, their contention that funds and appropriations are not synonymous is substantively wrong.

They cite to definitions in LPRA -- 3 LPRA 283(b) and (a), which are not applicable here, but the distinctions there are distinctions without a difference. Additionally, there is preemption under Title III, and contrary to what movants

argued earlier, there is a big difference between the GO debt and the obligations to appropriate funds to instrumentalities, and the difference is clear and obvious.

The difference is that the obligation to transfer money to the instrumentalities is just an obligation, whereas the Puerto Rico Constitution says that the promise to pay the GO debt gets paid first from available resources before anyone else. One is a priority. The other is a garden variety obligation, unsecured obligation. So we don't submit that preemption as to one means preemption as to the other.

THE COURT: And you are not pressing your priorities aspect of the preemption arguments in this Lift Stay litigation?

MR. BIENENSTOCK: No, I -- well, I'm not addressing all how it would --

THE COURT: How it would be --

MR. BIENENSTOCK: Right, but what I am saying as to Title III preemption is that the Commonwealth's obligation to transfer money to the three instrumentalities has no greater priority than any other prepetition -- prepetition general unsecured claim. And to say that it does, under some concept of Puerto Rico law that is unidentified, to my knowledge, would be subject to preemption.

But the movants haven't even identified any Puerto Rico law that says, hey, look, you have to make these

appropriations before you pay your other debts. You know, the GOs have obviously made that argument, because it jumps out of the Puerto Rico Constitution.

THE COURT: Thank you.

MR. BIENENSTOCK: Now I'm going to turn to PRIFA, although certain principles will be applicable to HTA and CCDA. First, the Board asked the Court not to rely on the monolines' characterizations of what the Board relies on or no longer relies on. The Board rejects the monolines' characterizations of the Board's position.

Because Trust Agreement Section 601 provides the PRIFA bonds can only be paid from pledged revenues, two dispositive issues arise immediately: What are they and who owns them? The pledged revenues are defined as the special tax revenues and any other monies that have been deposited to the credit of the Sinking Fund. Movants contend, "Deposited to the credit of the Sinking Fund," only modifies other monies, not the special tax revenues. They are wrong.

For now, I'll provide just two reasons. First, that the last clause, "deposited to the credit of the Sinking Fund," modifies both of the prior clauses, which are not separated by a comma, was the First Circuit's ruling in its *ERS* decision at 948 F3d 457. At page 467, the First Circuit wrote, "We start by rejecting the Bondholders' argument, as did the Title III court, that, in the Bond Resolution's

definition of Employers' Contributions, the limiting clause 'which are payable to the System pursuant to Sections 2-116, 3-105, 4-113' modifies only the antecedent phrase 'any assets in lieu thereof or derived thereunder' and not the other antecedent phrase 'the contributions paid from and after the date hereof that are made by the Employers.' The Supreme Court has held that 'when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.'"

On the monolines' demonstrative page six, they quote from page i, Roman numeral i, the first page of the official statement that crams a summary of the whole deal into one page. On that page, it separates by a comma the two clauses, so it looks like the rum taxes may not have to be deposited into the Sinking Fund. Nowhere do the monolines mention that page nine of the official statement, which is Exhibit 17 to the movants' PRIFA Stay Motion, provides a detailed disclosure under the bolded heading, security for the bonds.

It provides, "Pledged revenues consist of, one, such proceeds of the federal excise tax imposed on the rum and other articles produced in Puerto Rico and sold in the United States that are transferred to the Commonwealth, the federal excise taxes, and deposited to the credit of the Sinking Fund as required by the Enabling Act and the Trust Agreement."

Finally, the monolines claim the phrase "deposited in the sinking fund" cannot modify special tax revenues, because the Trust Agreement refers to the deposit to the credit of the Sinking Fund of pledged revenues. So how can deposited funds be deposited again?

There are two answers to the monolines' claim. First, the language they found is not operative language in the Trust Agreement. It is language from the back of a form of bond included in the Trust Agreement at pages five and six, which language attempts to summarize the collateral security.

Second, the monolines did not solve the problem, what they call their circularity problem, by claiming the deposit language did not apply to special tax revenues. The form of bond does not refer to special tax revenues. It just refers to pledge revenues deposited into the Sinking Fund.

So under the monolines' argument, if the deposit requirement only refers to any other monies, the language on the back of the form of bond still creates the issue of depositing pledged revenues, the other monies that are already deposited.

Now, who does the Sinking Fund account belong to --

The COURT: Mr. Bienenstock, I'm sorry. I'm interrupting you for a moment.

MR. BIENENSTOCK: Sure.

THE COURT: Before you go on to that next point, what

do you do with the argument that if any other monies deposited doesn't modify -- sorry. If it applies to special tax revenues, why mention special tax revenues specifically at all? Why not simply say the pledged revenues are whatever is deposited in that account? It seems to make special tax revenue reference superfluous.

MR. BIENENSTOCK: Well, I don't think it's superfluous in the context of the document. The entire document, starting with the Enabling Act, which allocates the special tax revenues to PRIFA, is all about the special tax revenues.

So it's totally understandable that someone drafting a document would want to be expressly clear that the collateral includes the special tax revenues, which are the 117 million dollars. A little extra clarity doesn't hurt. I know if I were sitting at the drafting section for those bonds that are counting on the 117 million, I would want explicit reference to them and wouldn't be happy if someone said, well, I'll just say any monies we happen to put there.

There is an obligation to put the 117 million there, and I want to make that crystal clear and not let anyone argue, well, that 117 million didn't really have to be put there.

THE COURT: Thank you.

MR. BIENENSTOCK: Now, who does the Sinking Fund

account belong to? In their Sur-sur-reply, the monolines mock the concept that they could have a lien and only have a lien against an account owned by the bond trustee. But bear in mind, this is the only pledge in the entire Trust Agreement. That's exactly what they got.

The notion that the bond trustee owns the Sinking Fund is a completely false invention, as proven by the Trust Agreement itself. First, movants point to the language in the Trust Agreement, Section 401, providing that the Sinking Fund shall be held by the trustee. Given that a protected security interest in an account requires control, the trustee is holding the account as one of the accepted methods of perfection.

Second, movants simply ignore the other language in Trust Agreement Sections 401, 401(a), 401(c), 402, 404 and 502. 401 names the Sinking Fund, but -- Puerto Rico Infrastructure Financing Authority Special Tax Revenue Bonds Sinking Fund. It certainly sounds like it belongs to the Authority, not the trustee.

401(a) requires PRIFA to withdraw money from the Infrastructure Fund and deposit it into the bond service account, which is one of the subaccounts for the Sinking Fund, in the amount of principal and interest to become due during the year. If the Trustee owns it, you wouldn't deposit the money early.

401(c), PRIFA can deposit it into the reserve account in substitution of monies, a letter of credit or insurance policy. This cannot possibly belong to the trustee as it is a reserve account that may never be needed.

402 instructs the trustee when he can withdraw money and what he can withdraw from the bond service account. If the trustee owned it, he would not need permission or instructions on when to access it.

404 requires the trustee to allow PRIFA to withdraw money from the reserve account when there is excess funding. It can't belong to the trustee if PRIFA is entitled to it.

And 502 requires that investment earnings of the Sinking Fund be paid to the Puerto Rico Infrastructure Fund when there is excess money. If the trustee owned it, he would get the earnings.

Third, UCC Section 9-607(a)(4) provides, funds credited to a deposit account that is collateral do not become property of the secured party until applied. 9-617(a)(2) provides, a deposit account or -- applies to secured debt only on collection.

Now, the Lockbox Agreement. Just a few facts to show it does not help movants. Neither PRIFA, nor the bondholders, nor the PRIFA bond trustee are parties. It protects the rum producers like the party. The existence of the Lockbox Agreement shows exactly how the bondholders should have

protected themselves if they wanted a security interest in the excise taxes at the Commonwealth level. Section 24 provides for no third-party beneficiaries.

The next to last whereas clause recites, the parties are entering into a deposit account control agreement to perfect a security interest in cash. That is exactly what the PRIFA bond trustee did not do at the Commonwealth level.

I just have a few arguments in the context of PRIFA about movants used of their expert report and financial statements. There are basically three reasons why we submit they have no materiality or relevance.

First, let's take a look at the government parties' PREPA demonstrative. There's just one, Your Honor. There are two, but one is the statute, so I'm referring to the first, which is the one-page diagram.

THE COURT: Okay. 329 --

MR. BIENENSTOCK: The flow of funds -- yeah.

THE COURT: Okay. And it's in Exhibit A of that?

MR. BIENENSTOCK: Right.

THE COURT: Okay.

MR. BIENENSTOCK: The flow of funds shows the money starting with the federal government, and then going to the Commonwealth, which then deposits it in the lockbox. And then the lockbox, Bank City, transfers 117 million to the Commonwealth TSA account. And then it goes into the

Infrastructure Fund, which according to movants' expert, may be located in one or more bank accounts. For present purposes, it won't matter.

Movants' expert report doesn't help resolve the issues here. As we explained in the government's Sur-reply, the expert defined "fund" as a concept to keep track of certain revenues, regardless of whether they were in one or more accounts. And he defined "restricted" as meaning a debt covenant to governmental purpose that would require use of the money for a particular objective.

No one here, including the Court, needs to see the word "restricted" to know what the PRIFA documents say the money should be used for. That's not the question. That's not even disputed. The issue is whether, under Title III, the documents and statutory obligations can or must be breached -- or the contractual and statutory obligations can or must be breached or specifically enforced. Accounting doesn't answer that question.

Finally, movants' expert looked at balance sheets for the Commonwealth for the dates, how much it was paying its debts, and made various observations. The point I want to make is that the balance sheets can only be based on account balances either at the lockbox, the TSA, the Infrastructure Fund or the Sinking Fund.

Let's look at the top of the exhibit of the

demonstrative. The balance sheet doesn't request cash the Federal Government is about to send the Commonwealth, nor does it reflect a check from the Federal Government being held by a Commonwealth employee deciding where to deposit it. Or if they use wires, the balance sheet doesn't reflect instructions Commonwealth employees could give the Federal Government, the lockbox bank, or the TSA, as to where to send the money.

The expert only sees where they sent it. That's the only thing the balance sheet reflects, and whether they marked it restricted. That doesn't help solve the legal issues here, namely, whether the Commonwealth could instruct each bank not to transfer the money to the Infrastructure Fund accounts, which is what has been happening or not happening the last three years.

Put differently, the balance sheets only show what restrictions the Commonwealth wanted to impose or comply with. And the ones looked at were during the good times when they were paying all their debts. They don't show what the Commonwealth's options were.

Now, on the Infrastructure Funds --

THE COURT: Before you go on, may I just explain that I gave the wrong document reference. I was looking at 13343, the government's demonstrative on those funds. Please go ahead.

MR. BIENENSTOCK: Thank you, Your Honor.

The Infrastructure Funds. First, it's important not to overlook the obvious, namely, that the Enabling Act authorizes and the Trust Agreement determines which authorizations to use. So while 3 LPRA 1914 provides, the Puerto Rico Infrastructure Fund shall be maintained by quote -- shall be "maintained by or on behalf of the Authorities," the Trust Agreement Section 401 provides, "The Authority shall maintain, with a qualified depository, the Puerto Rico Infrastructure Fund." Movants' contention that the Infrastructure Fund is at the Commonwealth is simply contrary to Section 401.

Additionally, and as a response to some of this morning's argument, all of this discovery, and looking for where the accounts are and what they need in them, you'll either find that the Commonwealth complied with the document or did not comply with the document. But who cares? They -- the document gives the parties their rights. And if they didn't comply, then someone might have a claim for not complying. But it has nothing to do with whether -- with what property interest the moving parties have.

3 LPRA 1914 also provides that the excise taxes covered into the Infrastructure Fund "shall be used by the Authority for its corporate purposes." Thus, the monolines' whole story about the Infrastructure Fund being at the Commonwealth and subject to their lien or equitable ownership

makes no sense. It is totally at odds with the open-ended corporate purposes that the Authority can use the money for.

Additionally, movants claim that rum excise taxes belong to PRIFA, and are held in the TSA, and they have a lien against them. This is additionally disproved by 3 LPRA 1918, which requires that, "all moneys of the Authority shall be deposited in depositories qualified to receive funds of the Commonwealth, but they shall be kept in a separate account or accounts in the name of the Authority." Thus, PRIFA's money cannot be held in the TSA.

The word "participation" in 3 LPRA 1914 logically refers to the share of Rum Taxes to be covered into the Infrastructure Fund. There's no reason it means "ownership".

3 LPRA 1913 shows the Commonwealth can terminate its annual appropriations to PRIFA, otherwise, it would not have needed to covenant not to terminate the appropriations.

Mr. Ahlberg's testimony that he understood the Infrastructure Fund to refer to the first 117 million of rum revenues earned is both understandable and totally irrelevant and immaterial. It's understandable, because in the years Puerto Rico was paying all its debts, it was expected that Puerto Rico would comply with the Trust Agreement and transfer the rum tax proceeds to the Infrastructure Fund as required by 3 LPRA 1914. It's immaterial, because it does not address any of the legal issues, such as whether the rum taxes became

subject to a security interest before being deposited in the Sinking Fund.

This testimony is only being hyped by movants because they created a fallacious theory that somehow the rum taxes became subject to the bondholders' lien immediately on the Commonwealth's receipt of them, and to shore that up, the monolines claim PRIFA becomes their equitable owner immediately because they say the Commonwealth holds the Infrastructure Funds. And since the taxes do not have to be deposited in the Sinking Fund, according to them, the security interest arises as soon as PRIFA gets them.

None of that story is borne out by the deal documents, the Trust Agreement. When we pointed out that the Trust Agreement, Section 401, provides, "The Authority shall not pledge or create any liens upon any monies in the Puerto Rico Infrastructure Fund," movants responded, it must mean no liens except for that lien. Suffice it to say, that's not what Section 401 says. That's something they just made up.

Finally, no language in the Enabling Act or Trust Agreement creates a trust in the Infrastructure Fund. Moreover, because that fund is for PRIFA's corporate purposes, movants lack standing to assert the Infrastructure Fund money is in trust. Only PRIFA would have that standing.

For a moment, I just want to review the legal determinations movants are asking for, or the hoops they are

hoping the Court will jump through. First, that the Commonwealth statutory agreement not to alter PRIFA's rights somehow transferred equitable ownership of the rum revenues to PRIFA. Second, that the Infrastructure Fund the Trust Agreement requires to be maintained by PRIFA is actually maintained by the Commonwealth. That the Trust Agreement's bar against liens against the Infrastructure Funds does not bar PRIFA from granting movants a lien, or from movants having a lien. And the definition of Pledged Revenues restricting them to Special Tax Revenues deposited in the Sinking Fund doesn't really mean that.

Now to HTA. Ms. McKeen will cover most all the issues relating to the disputes over the accounts, but as shown by the government parties' HTA demonstrative, other than the tolls collected by HTA, all the taxes and other revenues movants want originate at the Commonwealth and flow down to HTA when the Commonwealth appropriates them to HTA.

To be sure, they argue that in prior pre-PROMESA years, the appropriation was done by HTA. And that's perfectly logical since when the Commonwealth was paying all its debts, what is sometimes referred to as a standing appropriation in the statutes to send down the license fees and guest taxes, it's taken for granted that it will happen each year to pay the debts.

And it was totally within the Commonwealth and HTA's

powers to put it into HTA's budget. It doesn't mean that we should use that voluntary decision as evidence to change what the documents say. But the main issues are preemption of pre-PROMESA appropriation, whether one legislature can bind today's legislature, which is deemed to approve Oversight Board budgets, both of which are covered.

And the last issue, whether movants have succeeded in proving a security interest in HTA's purported rights to appropriations, if the appropriations are not preempted and given rise to a claim, as I will show, movants only have security interest in the Sinking Fund. First, Section 601 of the 1968 and '98 resolutions provides the revenues and funds are pledged to the extent herein above particularly specified. Movants omit that qualification from their Reply in paragraphs 33 to 39.

Section 401 is the only grant of a security interest in the resolutions, and it grants security interest only to the extent funds are deposited in the Sinking Fund that is herein above specified.

Movants claim to have a perfected security interest in HTA's rights to monies from the Commonwealth. In fact, they only have security interest in monies received by HTA, but they are not perfected for many reasons.

Your Honor, may I ask how long I have?

THE COURT: Ms. Selden.

MS. SELDEN: About 12 minutes.

MR. BIENENSTOCK: Okay. Thank you. Thank you.

THE COURT: Mr. Bienenstock, would you make sure to touch on the position as to ownership or security interest in excise tax monies that have reached HTA?

MR. BIENENSTOCK: Yes. To the extent whatever -- whatever taxes or other revenues are in the Sinking Fund are subject to their security interest.

THE COURT: But only what is actually in the Sinking Fund?

MR. BIENENSTOCK: Right. Now, that doesn't -- right. That's right.

THE COURT: Thank you.

MR. BIENENSTOCK: In regards to perfection, no section of either the 1998 resolution or the 2002 Security Agreement grants a security interest in HTA's receivables or any right of HTA to receive revenues. The security interests are limited to monies already received by HTA.

Even on the expansive view of the security interest granted by the 1998 resolution, it grants only security interest in revenues "received" by HTA. That's a 1998 resolution, Sections 101, 401, and 601.

Similarly, the 2002 Security Agreement grants a security interest in the '98 resolution funds, which are deposit accounts, and amounts that are required to be on

deposit in them by the terms of the 1998 resolution. The only monies the 1998 resolution requires to be on deposit are the 1998 resolution funds or revenues that have been received by HTA. Received funds are, of course, put into and held in a deposit account.

As a result and as discussed, or as I will discuss, movants' security interests are best characterized as security interests in deposit accounts under Article Nine of the Uniform Commercial Code. Movants claim a security interest in deposit accounts are perfected because when the security interests were granted, Article Nine of the UCC did not cover deposit accounts, and when revised, Article Nine came into force, it provided continuing validity.

Movants are wrong. I'm going to abbreviate what I plan to say for lack of time, but suffice it to say, movants have cited the wrong statute. They cite the transition rules in Article Nine for the attachment of the security interest. They cite 19 LPRA 2402(b), but the correct citations is 19 LPRA 2403(b).

And the bottom line to that is whatever happened pre the revision of Article Nine, it would have to be fixed within three years. Three years long ago expired, in about 2015, and it wasn't fixed.

To avoid this conclusion, movants try to assert their security interest is in accounts, which are not to be confused

with deposit accounts, for payment intangibles. This is wrong. Article Nine defines accounts as a right to payments of a monetary obligation, and a payment intangible is a general intangible under which the account debtor's principal obligation is a monetary obligation.

A security interest in amounts or monies in deposit accounts is a security interest in a deposit account. Movants' security interests are in the 1998 resolution funds, and at the most, on all amounts received by HTA. To qualify as security interests in payment intangibles or accounts, movants' security interest must extend to HTA's right to payment. But even on movants' expansive view, none of the HTA bond resolutions grant movants a security interest to any rights to payment of revenues. They only grant a security interest in monies actually received by HTA into HTA's accounts. Movants have not seemingly alleged otherwise.

As a result, it is a security interest on deposit accounts that can only be perfected by control, which does not exist. Which does not exist.

Your Honor, as much as I would like to cover the HTA slides and --

COURT REPORTER: I'm sorry. Could the person speaking identify themselves?

THE COURT: Yes. Who is speaking now? Mr. Bienenstock was speaking. Who just spoke? Hello? Would

someone who can hear me say that they can hear me?

MS. NG: Judge, can you hear me?

THE COURT: Yes, I hear Lisa.

MS. NG: Okay.

THE COURT: Okay. Mr. Bienenstock, can you hear me?

MR. BIENENSTOCK: Yes, I can, Your Honor.

THE COURT: Okay. Was that a different person speaking or was that -- he said, as much as I would like to something. Was that you?

MR. BIENENSTOCK: No, that was not me.

THE COURT: Okay.

MR. BIENENSTOCK: I said, as much as I would like to go on with HTA, I wanted -- and the slides, I was going to say I want to get some of the comments made earlier in the argument. And Ms. McKeen is going to cover the dispute over the CCDA transfer account.

THE COURT: Okay. Was that Mr. Bienenstock?

MR. BIENENSTOCK: Pardon me?

THE COURT: Is that Mr. Bienenstock who just said that?

MR. BIENENSTOCK: Yes.

THE COURT: For some reason, voices are sounding different to me.

MR. BIENENSTOCK: Yes. This is Martin Bienenstock.

THE COURT: Okay. I'm so sorry. For some reason,

the sound quality changed, so I was confused.

So we'll put you another minute and a half on the clock to cover my confusion.

MR. BIENENSTOCK: Thanks, Judge.

I want to go back to cover a few comments made earlier, but I will say, as far as CCDA, and again, HTA, we believe the preemption issues and the inquiries here, they -- there is no obligation, other than an unsecured prepetition obligation to transfer any of these monies to any of these three entities, and as a result -- and that none of the documents give them a security interest at the Commonwealth level. So we think that ends the matter.

And whether CCDA's transfer account is one number or the other has no materiality or relevance to the Stay Motion. I think that's clear, but I just wanted to put it on the record as our position.

Contrary to the argument that there's some type of trust in HTA, based on the *Flores Galarza* case, we think it was totally different. It was motorists sending their own money into the government, which was duplicative of insurance premiums they had paid for private insurance, with their own money being returned to them. And so the government was holding their money for them. And the statute contemplated that people would pay duplicative premiums, and the duplicates would have to be returned.

The notion that preemption is not ripe -- we think that preemption is key, key to this for the reasons that I've already mentioned.

THE COURT: Mr. Bienenstock, are you still there?

MR. BIENENSTOCK: Yes. I'm sorry. I was looking at my notes. It wasn't that you lost the sound.

THE COURT: Yesterday I got cut off, so I'm just checking.

MR. BIENENSTOCK: I wanted to address some of the DRA issues. As I explained earlier, whether the obligation to transfer taxes that the DRAs are concerned about fit within the definition of appropriations or not, as I explained earlier, has no consequence here. Any obligation to transfer is preempted by PROMESA.

Otherwise, as I said at the very outset, these claims would become equivalent to specifically enforceable nondischargeable claims. And to make them that way, I think -- none of the moving parties would dare say to Your Honor, I'd like Your Honor to determine that my claim is specifically enforceable and nondischargeable, because the statute doesn't come close to doing that.

So instead, they have said, well, tell me I've got equitable ownership. Tell me I've got a trust. Tell me I've got something that takes it outside of the property of the Commonwealth.

And Your Honor, this is reminiscent of equitable remedies outside of bankruptcy. When you don't have bankruptcy and debts can be paid in full, courts frequently come up with equitable remedies. But those equitable remedies are frowned on and virtually banned and preempted in bankruptcy because their only effect is to spring one unsecured claimholder ahead of another.

It's true that the Commonwealth has breached its obligations to its creditors. It's not a good thing. It's a bad thing. But for one group of creditors to say, well, give me a special remedy, I have a transfer obligation, you only have a promise to pay, makes no logical sense.

And I think on that, Your Honor, I'll stop, subject to Your Honor's questions.

THE COURT: Thank you, Mr. Bienenstock. Let me just take a minute to -- so as to standing, do you dispute that movants have standing to bring their motion with respect to toll revenues and any other monies that have hit HTA but are not necessarily in the Sinking Fund?

I'm asking about standing, not about whether you think there's a security interest, whether you think they'll win on the security interest.

MR. BIENENSTOCK: Right. Your Honor, we're not -- we're not attacking standing for purposes of making the stay relief motions. That's actually where this started

approximately a year ago, with the PRIFA rum tax stay relief motion.

THE COURT: Yes.

MR. BIENENSTOCK: We're not making that type of attack on standing. Our standing objections today are to the extent that movants have claimed that they have a trust, a beneficial trust interest in monies that, outside of bankruptcy, were supposed to be transferred to the three entities, we're saying that it's those three entities.

Now, we do acknowledge that the -- in each of these three instances, there's a statute on the books where the Commonwealth committed that it would not alter or impair the rights of these three entities while the relevant bonds were outstanding. So I think for purposes of making claims based on that statute, the bondholders would be included as having standing, because the statute was addressed to them as much as to the three instrumentalities.

But for purposes of stay relief, based on having a secured interest or some other property interest, whether a trust or whatever, we don't think they have standing for that based on the statutes.

THE COURT: So whereas to matters in which you might concede, there's a more -- I'm not even going to get into the word "colorable", so -- and I'm not going to try to summarize because the hour is late, but I do think I follow what you

said. So I thank you for that.

And let me just take one more minute to look at my notes. Let's see. You said that as to the cash flow, that includes the transfer account and the surplus account, so I think that that is CCDA, that it doesn't matter which account is the transfer account. If that is what you said, I'd be grateful if you'd explain that a bit further, because my impressions have been that the identity of the transfer account was a material issue, because the Oversight Board is contending that it's an account that is not funded and the movants are contending that it is an account through which all money goes.

MR. BIENENSTOCK: Right. I think -- I hope I said it in the context -- in the context of it doesn't -- it doesn't matter in terms of whether preemption allows the Commonwealth to cease all transfers of these taxes. And I didn't say it earlier, but I should have, that, you know, we don't believe that the taxes belong to the Tourism Company. They were made effectively a collection agent. In fact, you might even say that the Commonwealth hadn't been doing a good job at it, so they became the collection agent.

The taxes still are Commonwealth taxes, but as to which account they're in, we know the moving party's looking for the account into which money is being -- money is being deposited, because they have a lien on the transfer account.

If it's -- well, they have a lien on the actual transfer account, not the one they've designated as the transfer account.

We can -- you know, we can reroute the money. It's in that sense I said it doesn't matter. But I suppose for purposes of determining the amount of their lien at any given time, it would matter which one it is, because they have a -- they don't have a lien on all the accounts. They only have it on the transfer account.

THE COURT: Thank you for that clarification.

And so it is now 12:42. We will break for lunch and resume at 2:15 with Ms. McKeen's argument. And then we will continue through the remaining arguments.

Thank you very much for the arguments thus far this morning, and for all of the thousands of pages of submissions in advance of the hearing. And you can see that I have spent a great deal of time on them.

So have a good lunch, and dial back in at 2:15, please. Thank you. Be well, everyone.

MR. BIENENSTOCK: Thank you.

(At 12:43 PM, recess taken.)

(At 2:19 PM, proceedings reconvened.)

THE COURT: Good afternoon. This is Judge Swain.

MS. NG: Hi, Judge.

THE COURT: Ms. Ng, are you there?

MS. NG: Yes, Judge. I'm here.

THE COURT: Hi there. Are we all ready to proceed?

MS. NG: Yes, we are.

THE COURT: Very well. Again, good afternoon. Buenas tardes to everyone.

I believe the next person up to speak is Ms. McKeen for AAFAF for 15 minutes.

MS. MCKEEN: Thank you, Your Honor. Good afternoon. Elizabeth McKeen of O'Melveny & Myers for AAFAF.

Before I begin, I want to quickly address what Ms. Miller said about AAFAF's preemption position. Ms. Miller said we -- that AAFAF vehemently disagrees with the Board's preemption argument, and that's just not right. We agree Title III has preemptive parts. We did not join the other preemption argument made by the Board because, as the Court knows, we've had historical disagreements with the Board regarding the breadth of its powers under PROMESA, and we simply don't think the Court needs to reach these issues to deny these motions in their entirety. I think calling it vehement disagreement is unfounded.

There are two distinct issues here that have to be disaggregated, even though the monolines repeatedly conflate them in their brief and in their argument. Those issues are who owns the revenue, on the one hand, and then on the other hand, what liens exist in favor of the bondholders.

As for the latter, putting aside perfection issues, the bondholders clearly have liens on specific accounts at each entity. Those are very specific. They can be discerned plainly from the face of the docket. But as the briefs and as Mr. Bienenstock explained, that's all they have. And the clarity of those liens stands in sharp contrast with everything else they claim from a sort of muddled set of doctrines and incorrect factual contention.

As for who owns the revenues, we think the touchstone of that analysis has to be statutes themselves. Those statutes gave an expectancy interest, but they did not transfer the Commonwealth's ownership interest to the bondholders.

First, the bondholders' liens from the instrumentalities are themselves fundamentally inconsistent with the idea that the bondholders also own the Commonwealth's revenues, as they tried to argue. This Court's recognized that already. It's recognized the contention that funds that are subject to a lien are spatially incompatible with full ownership of the funds. That was in the *Assured-HTA* case, 582 B.R. 579, at 598.

Second, contrary to what Mr. Ellenberg argued, when the Commonwealth legislature intends to transfer ownership of public funds, the language of the statute is unmistakable on that point. And I think COFINA is instructive, as this Court

recognized in its colloquy with Mr. Ellenberg.

The post restructuring COFINA statute contains a provision entitled, ownership of the COFINA revenues. It states that transfer of the COFINA revenues was, quote, An absolute transfer of all legal and equitable right, title and interest, and not a pledge or other financing. And it goes on to say that COFINA, quote, Is and will be the sole and exclusive owner of the COFINA revenues. And that those revenues don't constitute available resources under Section Eight, or Article VI of the Constitution.

Now, that's not a new --

THE COURT: I'm sorry. What I want to say is that the new COFINA statute was drafted in the light of Title III and substantial litigation of all these issues. Is there any statutory language or means, short of that sort of very specific lengthy language that's in the new COFINA statute, that you would recognize as dedicating a stream of tax revenues securing repayment of bonds in a way that couldn't be undone by subsequent legislation or a certified budget?

MS. MCKEEN: That's a good question, and I think the prior COFINA statute that the Board cited in its papers also goes a lot farther than the statutes that we have here. I think what's clear is that the statutes here don't even come close to where they would need to be to get the monolines to the promised land.

They use language like, shall pay, shall transfer, shall be covered into, shall be deposited; and that kind of language creates nothing more than an expectancy. It doesn't create property rights, much less in favor of the bondholders. And that's why I think you heard Mr. Ellenberg and Ms. Miller speak a lot about intent, and that's because the statutes just don't say what they want them to say.

And Mr. Ellenberg also argued --

THE COURT: You --

MS. MCKEEN: Go ahead. I'm sorry.

THE COURT: I'm sorry. The first COFINA statute I think also postdated these other statutes, and so, you know, to get into a little bit of mind reading, but I'd like to know what your position is, would your position be that the COFINA provision for transfer was a decision by the Commonwealth to change its practice, or is there some way short of the specific use of the word "transfer" that the Commonwealth could alienate its interest in the stream of revenue if it intended to do that?

MS. MCKEEN: I think there certainly could be, but we don't need to guess at that here, because the language of the statutes that we have in front of us don't even come close. I think it's a good question, and it's hard for me to speculate about where that line gets crossed, but it's not crossed here. They don't even come close to it here.

THE COURT: Thank you.

MS. MCKEEN: With respect to the statutory language, Mr. Ellenberg argues that it's the law, but as Mr. Bienenstock explained, that argument is entirely inconsistent with Chapter Nine, which relieves the debtor of all manner of financial obligations, including those that arise by statute.

The Commonwealth itself made no pledge to the bondholders at all, and because the language of the statutes don't -- it doesn't give the movants the right they claim, they ask this Court to go on and infer property rights that don't otherwise exist based on a host of different things. One of the things they think gets them to where they need to be is this characterizing what they call a course of performance, that they say confirms their reading of the law. But course of performance isn't relevant to statutory interpretation for a good reason.

Whatever accountants say or whatever Treasury employees do to facilitate the Commonwealth's state of their cash management can't create property rights that don't otherwise exist against public funds. That's kind of a fundamental point. If the movants didn't get the rights to hundreds of millions of dollars pursuant to these statutes, it doesn't make sense to think that they somehow got those rights because of how the Commonwealth engaged in accounting.

But the monolines also ignore facts that either

undercut or downright disprove their argument. For example, with respect to the Commonwealth collection of excise taxes and rum taxes, there's no question that in the first instance, the Commonwealth takes its funds and puts them into its own account.

The movants rely on language about special deposit funds in a Commonwealth financial statement to argue that maybe the Commonwealth holds these funds only as a trustee or as a collection agent, but when the Commonwealth holds funds as a custodian for another entity, the financial statements make that very clear with disclosures. And as the Oversight Board explained in its Sur-reply brief, nothing in the financial statement suggested that the excise taxes were the wrong taxes, were in a special deposit fund. There's no mention of HTA or PRIFA funds whatsoever in that context.

So that tells you what you need to know on the point about course of dealing. The Commonwealth wasn't or didn't consider itself a fiduciary or a collection agent for any funds at issue in this case.

And I think *Flores Galarza* sort of makes the point all the more clear, because in that case, you had a statute that was very clear about the Commonwealth being a collection agent. And in fact, you had a situation where the Commonwealth was given a fee for conducting collections. And so the combination of the financial statement and the

monolines' characterization of *Flores Galarza* show you that they're asking the Court to make these huge inferences, when the reality is the Commonwealth knows very well how to express all these points when it wants to.

Now, to conclude, I'd like to address some of the instrumentality specific arguments that the monolines make, because I think they are based on either misinterpretation or sometimes just plain mischaracterization of the facts. And I think it's important to talk about some of these with some specificity.

With respect to HTA, contrary to their arguments, the existence of Fund 278 doesn't show that these excise taxes are held in trust. Some codes do not define or relate to property rights. They are a mechanism within Treasury's accounting system used to classify funds upon receipts.

Putting aside that a fund code isn't a bank account and it's not used to segregate money, the fund code 278 isn't even exclusive to HTA. There are revenues tagged from 278 that were never allocated to HTA. As one example, before the Lockbox Agreement was executed, rum tax proceeds paid to rum producers were classified with the Fund 278 code, which you can see right on page 15 of the demonstrative that Ms. Miller referred to with respect to PRIFA.

There is highlighted text there referring to Fund 278, even though it's with respect to a payment being made to

rum purchasers. So it can't be that designated money -- the fund code 278 makes that money HTA, or makes that money bondholder property, when there's clearly fund code 278 designated monies that are not HTA's property.

The monolines' expert, Mr. Holder, claims that classifying excise taxes with that fund code conveyed that the revenue is restricted, but he cites no evidence whatsoever to support that assumption. And in fact, right after saying that Treasury use of code fund 278 must convey a debt service restriction with respect to HTA, he turns around and draws the exact opposite conclusion in his discussion of PRIFA, saying that the accounts used in systems like PRIFA are, quote, Helpful for tracking funds subject to particular restrictions, but are not in and of themselves ultimately determinative of which money they're held with special funds or otherwise subject to restriction.

The monolines --

THE COURT: I'm sorry. Since we're on PRIFA for a moment, can you tell me what the PRIFA Infrastructure Fund is and where it's located? Who maintains it?

MS. MCKEEN: Yes, Your Honor. So the PRIFA Infrastructure Fund -- and if you'll allow me to just check my notes, I want to make sure that I get this right. Under the terms of the Enabling Act, the Infrastructure Fund is a special fund to be maintained by or on behalf of PRIFA, and to

be used by PRIFA for its corporate purposes.

The Enabling Act also allowed PRIFA to segregate the funds into one or more subaccounts. As the Commonwealth and PRIFA's 30(b)(6) witness testified, there was no bank account or accounting designation that was understood to be the Infrastructure Fund. It was the understanding of Commonwealth personnel that the Infrastructure Fund referred to the first 117 million dollars of rum tax revenue.

So when you read the statute and compare it to the predefault funds, the most logical conclusion is that the Infrastructure Fund existed across two accounts into which the Commonwealth transferred the first 117 million dollars of rum taxes; the 113 million dollars of PRIFA debt service that was in an account that GDB administered; and the four million dollars that went to a PRIFA general account for PRIFA's operational purposes.

What I would also say about that, as long as we're talking about PRIFA, is that while movants argue that the Infrastructure Fund is part of the TSA, and it attempts to kind of expand their rights to reach Commonwealth accounts, they -- in doing so, I think they ignore Section 1914 of the Enabling Act, which expressly contemplates the Infrastructure Fund can be segregated into one or more subaccounts, because that's precisely what was done here.

THE COURT: And is it your position that those

accounts have not been funded since the cessation of payments on the bonds?

MS. MCKEEN: That's correct, Your Honor.

THE COURT: Thank you.

MS. MCKEEN: The last thing I want to address is quickly, with respect to CCDA, the transfer account is empty. The movants are struggling to define a different account to be the transfer account. And their argument, which is entirely made up, is not only inconsistent with the flow of funds that the documents dictate, it's also inconsistent with what actually happened.

When they start from the premise that the initial collection account, the Scotiabank 5142 account is the transfer account, it means they're forced to argue that the actual transfer account, which is GDB-9758, must be the surplus account; and they double-down on that argument, because some account materials associated with the transfer account use the word "surplus" in the account name. But there's no question that that account functioned as the transfer account.

GDB-9758 is the only account in the flow of funds that ever funded the pledge account, which channeled funds for that service. That's how you know it's the transfer account. And similarly, you know that Scotiabank 5144 is a surplus account, because it received the surplus funds. And that's

not what happened with GDB-9758, which received all of the funds.

So, to conclude, we believe that -- yes, Your Honor.

THE COURT: Give me your conclusion, and then I'll ask you my follow-up question.

MS. MCKEEN: Okay. We think the inconsistencies and the movants' submissions in support of the HTA and PRIFA motions make the shortcomings of their argument clear. With respect to HTA, they argue that the lack of an annual budget appropriation means they have an ownership interest, but when the rum taxes are subject to a budget appropriation, they say it doesn't matter.

With HTA, they say fund codes show an ownership interest. With respect to PRIFA, they say it doesn't matter. And that's because their argument really boils down to no matter what the facts are, we should win. Their positions aren't based on any consistent or coherent set of principles, because they're hunting and pecking for something to hang their hats on, because the statutes didn't say what they want.

Mr. Ellenberg's mouse trap is empty. The Commonwealth knows how to grant property interest when it wants to, and that's not what it did here.

Thank you, Your Honor.

THE COURT: Thank you.

Now, going back to CCDA, are the movants wrong when

they argue that factual disputes over which account is the transfer account should be determined in the context of their proposed CCDA enforcement action as opposed to the Lift Stay litigation?

MS. MCKEEN: I think they are, Your Honor. I think that this is something that should be done in the context of this proceeding.

THE COURT: In aid of --

MS. MCKEEN: I --

THE COURT: -- what determination? I mean, in aid of a determination of a likelihood of success in showing a security interest in -- because it certainly seems to me that I can't do anything that would be preclusive of the argument.

MS. MCKEEN: I think this goes to the likelihood of success issue, yes, Your Honor. I think that's right.

THE COURT: And so you think that I should be resolving factual material, factual disputes for purposes of determining a likelihood of success?

MS. MCKEEN: I think you can conclude that they haven't made their case; that there's a likelihood of success here; and that a definitive determination could always be made in connection with the summary judgment proceeding. But for purposes of these proceedings, they haven't met their burden.

THE COURT: Should this be -- if the factual issue is material to a question of whether they've made a prima facie

case, is it something that I should consider further evidence on in connection with a final hearing, or is it something you think I can resolve on this record?

MS. MCKEEN: I think you can resolve it now, because they haven't created a dispute sufficient to entitle them to stay relief. The argument that they're advancing is precluded by the plain text of the relevant agreement, because the Assignment Agreement requires that the surplus account only receive tax revenues that are in excess of the amount certified by GDB as required for debt service. So they have no lien over the surplus account.

And their proposed mapping would have their debt service payments being made from the surplus account. That's how you know it can't be. And because their argument is not credible, there's, frankly, no need to continue to consume the parties' resources and judicial resources to have a full evidentiary hearing to dispense with this argument.

THE COURT: Thank you.

MS. MCKEEN: Thank you, Your Honor.

THE COURT: The next person up to speak is -- well, for the UCC, I have Mr. Despins and Mr. Zwillinger listed as speakers. And so how do you propose to allocate your time?

MR. DESPINS: Your Honor, good afternoon. This is Luc Despins with Paul Hastings. I will cover the presentation for the Committee. It's ten minutes, but I expect to be

shorter than that and to cede, with the Court's permission, my time back to Mr. Bienenstock.

THE COURT: All right, then. Thank you. Please begin.

MR. DESPINS: Okay. Thank you, Your Honor.

So, at the end of the day, the monolines' argument is really that intent should govern here. And that's really the argument that was made by Mr. Ellenberg. So they cobble together some statutory provisions, a few documents here and there, and say, voila, we have a security interest. But we know how to grant a security interest. People know how to do that. And maybe they failed to do that here because they never thought that the Commonwealth would be insolvent, but they just didn't.

And the best evidence of that are the 2015 failed amendments to the statute, which are referred to in our pleading at docket number 10634, where we take the Court through the fact that there was a proposal to amend these statutes. It would provide for a lien on gross revenues. It provided for a payment mechanism directly to the trustee. And, of course, that's not the landscape we have now. So they really have no security interest.

The second point I want to address briefly, Your Honor, is the *Galarza* case. It was key in that case, this is on page 24 of the Court's decision, that the Secretary or the

Commonwealth was not in the business, in the insurance business. And that was the crux of the argument, is that the Commonwealth is not in the business of collecting premiums. And of course, therefore, it acts merely as a custodian.

But here in our case, the Commonwealth is in the business of collecting taxes. That's what they do for a living. And therefore, the *Galarza* case really doesn't work from their point of view. And also, very importantly, *Galarza* is not a bankruptcy case. And that's very important. I'll tie that in in a second.

They cite the *Howard's Appliance* case, 1989, Second Circuit case. That's a case, Your Honor, that's been distinguished every time it's been cited, which tells you a lot.

And the Second Circuit itself in the *First Central Financial* case in 2004, 377 F.3d 209, went out of its way to say, well, we're not overruling *Howard's Appliance*, but, quote, We need to act very cautiously to minimize conflicts with the goals of the Bankruptcy Code when we're dealing with constructive trusts. And also said that, we carefully note the difference between constructive trust claims arising in bankruptcy, as opposed to those arriving before bankruptcy.

And that's the tie-in to *Galarza*. That's why the *Galarza* case is of very limited application, given that it's not a bankruptcy case.

And here what we have, Your Honor, are unsecured promises to do certain things. The Commonwealth obviously did promise to do certain things, but that's no different than what it promised to do with our constituents who built buildings for the Commonwealth. They were promised to be paid, paid by a date certain, et cetera, et cetera, and that never happened. That's why I always refer to this bankruptcy as the land of broken promises. This is one more broken promise.

The next point I want to address, Your Honor, that's very important, is that the Committee is not bound by any Commonwealth pre-Title III waiver. They're not saying there was a waiver, by the way, and the Board has addressed that carefully in their papers. But to the extent Your Honor would be inclined to find that there was a waiver, it's not binding on the Committee.

The monolines are saying, well, of course it's binding on the Committee. The Committee only has its claims again, you know, through the Commonwealth, and that's true when we're dealing with affirmative claims. So, for example, if we want to sue a counterparty that did business with the Commonwealth, we only have claims that we can assert derivatively, if the Court were authorized -- were to authorize such a claim.

But when we're dealing with defenses to a motion to

lift the stay, that's not the case. Any party in interest can object to a motion to lift the stay. We cited the *Cheeks* case for that proposition. And in that case, the Court said, well, the debtor is silenced because the debtor has signed a forbearance agreement leaving all their rights pre-bankruptcy, but any party at interest can object. And that's why we're not bound by any waiver. And we're not saying it was a waiver.

And finally, Your Honor, the issue of Title III preemption. Your Honor, they're relying on a statute that says the funds shall, quote, shall be used solely for a certain purpose. That statute either created a security interest -- that's the argument you were making. We don't think it did -- or it has to be preempted to the extent they're relying on it to get some other better treatment, because otherwise, they are getting a priority that's not enforceable in Title III.

And the argument by Mr. Ellenberg that this is the law, the law must be abided by, and then referring to yesterday's hearing regarding PREPA, you know, I want to make sure we focus on that for one second. Just -- the reason why PREPA is bound to follow regulatory law is because there's a section of 28 U.S.C., it's Section 959(b), that says a debtor or trustee must operate their business in accordance to local laws. That section doesn't mean, and therefore, you must pay

all the creditors you've promised to pay pursuant to statute. And therefore, that's really a non sequitur.

And for all these reasons, Your Honor, we believe that the motion should be denied.

So as I said, I cede the rest of my time to Mr. Bienenstock. Thank you, Your Honor.

THE COURT: Thank you, Mr. Despins.

So Mr. Bienenstock, it looks like a little over four minutes.

Ms. Selden, will you tell us what Mr. Bienenstock has?

MS. SELDEN: About four and a half minutes, Judge.

THE COURT: Thank you.

Mr. Bienenstock.

MR. BIENENSTOCK: Thank you, Your Honor. Martin Bienenstock of Proskauer Rose, LLP, for the Oversight Board as Title III representative of the Commonwealth.

I'll try not to even use the full four and a half minutes. I wanted to address just one issue. Your Honor asked me a question as to why the term "special tax revenues" is used in the definition of pledge revenues. And I gave an answer, I think it was right, may be, may not be, but it was en route to trying to figure out whether the final clause in the definition of pledge revenues, that clause being "that have been deposited to the credit of the Sinking Fund," should

modify only "any other monies" or should also modify "special tax revenues".

And the reason Mr. Despins ceded me some time is because I discovered over the lunch break that the Trust Agreement makes it crystal clear that the final modifying clause that had been deposited to the credit of the Sinking Fund, has to, must, absolutely must modify special tax revenues for the following reason. Special tax revenues, Your Honor, are defined in the Trust Agreement to mean the offshore excise taxes deposited to the credit of the Puerto Rico Infrastructure Fund pursuant to the Act.

In turn, Section 401 of the Trust Agreement provides, the Authority shall not pledge or create any liens upon any monies in the Puerto Rico Infrastructure Fund. Therefore, if pledged revenue is defined to mean special tax revenues, without the qualifier "that have been deposited in the Sinking Fund," the definition of pledged revenues would be in violation of Section 401, because it would create a lien on special tax revenues that are defined as deposited to the credit of the Infrastructure Fund.

So, in order to prevent one provision of the Trust Agreement from violating and being inconsistent with the other, the only way to reconcile them is to say the special tax revenues, as part of pledge revenues, have to have been deposited to the credit of the Sinking Fund. They are no

longer in the Infrastructure Fund.

And if Your Honor interprets it that way, the Trust Agreement will not violate itself, the Court will be consistent with the First Circuit, and the First Circuit decided that same interpretation issue consistent with the Supreme Court. And that's all I wanted to say.

THE COURT: Thank you, Mr. Bienenstock.

MR. BIENENSTOCK: Thank you.

THE COURT: And now I will turn to Ms. Coffino for Bacardi.

MS. COFFINO: Good afternoon, Your Honor. For the record, I'm Dianne Coffino from Covington & Burling. We're counsel to Bacardi International Limited and Bacardi Corporation, one of the Commonwealth's rum producers.

I'm not going to duplicate arguments made by the Oversight Board with respect to the first 117 million dollars of rum excise taxes that they receive every year. I do want to clarify for the record, however, that Bacardi did not agree, as movants claim in their Reply Brief, that that first 117 million really belongs to PRIFA. All we did was defer to the Oversight Board to address that issue, and we refrained from duplicating those arguments.

I also want to respond to movants' contention, which they relegate to a footnote, that the rum producers have no standing to be heard. There's no question that Bacardi is a

party in interest in this case. It's a counterparty to operative transaction agreements with the Commonwealth, and it's a secured creditor that holds a perfected lien on certain rum excise taxes deposited in the lockbox held by the Commonwealth Treasury.

I'm sure we'll hear, because we've heard it before, that movants don't need to lift the stay to file an action against Bacardi, and in theory that's true. Bacardi's not a debtor. But what they seek to do here is exercise control, particularly at the Federal Treasury level, over a revenue stream that belongs to the Commonwealth, and to interfere with the Commonwealth contractual relationships with rum producers. That requires lifting the stay or we wouldn't be here. It also would interfere with our contractual rights and our rights as secured creditors with perfected liens.

So I think we can say that safely gives the rum producers standing to be heard. I'll limit the rest of my argument or my comments on the arguments made by movants in support of their request to lift the stay to bring claims against both the Commonwealth and the rum producers for allegedly conspiring to divert rum excise taxes from PRIFA to the rum producers.

Movants make fleeting references to claims such as conversion, unjust enrichment, subordination rights, but they don't support these allegations in any way. In fact, to the

contrary, movants repeatedly admit in their amended motion that any rum excise taxes received by the Commonwealth in excess of the first 117 million belong unequivocally to the Commonwealth, and that neither PRIFA nor PRIFA bondholders have any claim to them.

The Lockbox Agreement, that document itself, which really only memorialized the parties' prior practice, makes clear that no funds flow to the rum producers until after the first 117 million is transferred from the Treasury's lockbox account to the TSA and certain other payments due other parties are made under the waterfall. These admissions alone make it impossible for movants to demonstrate a likelihood of success on the merit.

Nevertheless, they argue that Section 4.6.1 of the Bacardi Agreement, which only contains an acknowledgement of the Commonwealth's retention of the first 117 million in rum taxes, creates some sort of subordination relationship with PRIFA. But this provision and the waterfall really only reflects an agreement between, again, the Commonwealth and the rum producers as to a sequence of payments.

Neither PRIFA nor the trustee are parties to the Lockbox Agreement, or any other transactional documents between the rum producers and the Commonwealth. Moreover, the Lockbox Agreement makes clear in Section 24 that there are no third-party rights here; that the agreement itself doesn't

create any right or cause of action in or on behalf of any person that is not a party to an agreement -- to the agreement, and they are not, and -- as we are not parties to their agreements.

You perfect an interest in cash by control, and that is what we did to protect our interest. But neither PRIFA nor PRIFA bondholders had control. They never had control. So this notion of a subordination right just has no basis in fact or law.

Finally, I just want to end by saying that the rum industry is one of Puerto Rico's success stories. Even in the midst of what has been a staggering series of events that have created great hardship for the Commonwealth and its people, the production of rum, if you just look at the Commonwealth's own financials, shows that it continues to grow, generating tax based revenues, increasing tax based revenues in the hundreds of millions of dollars to the Commonwealth. And the payments that are made to us, to the rum producers, are used to promote and market that industry and the rum products. Movants should not be allowed to disrupt that industry or that revenue stream.

And unless you have questions, Your Honor, I'm done.

THE COURT: Thank you so much, Ms. Coffino.

MS. COFFINO: You're welcome.

THE COURT: And now we will return to movants for

rebuttal argument. You have 14 minutes. So who was up first for movants on rebuttal?

MR. ELLENBERG: Sorry, Your Honor. This is Mark Ellenberg. I had to get unmuted, which is a bit cumbersome. Your Honor, I will take five minutes of our rebuttal time, and Ms. Miller will take the balance.

So Your Honor, the Court identified the obvious weakness in the government parties' position on excise taxes in its very first question, and their position is entirely circular. It assumes a question in the case, which is whether we are secured, or whether HTA is the true beneficial owner of the excise taxes. If HTA is the owner of the excise taxes, or if we have a statutory lien against the excise taxes, then all of their arguments fall apart, because they just assume that we're unsecured creditors and they can do whatever they want to us. That's at issue before the Court.

Now, you asked Mr. Bienenstock what support he had for his position, and he never went to the statutes. All he said was there are no words of pledging or granting of liens in any of the statutes. I dispute that, but it's the wrong test.

Bankruptcy Code Section 101(37) says that a lien is a charge against or an interest in property to secure payment of a debt or performance of an obligation. There are no magic words specified there, and case after case have held that none

are required. In fact, the UCC says that anything intending to be a security agreement will be deemed one. The HTA Statute, we've gone through it. There's clear language there suggesting that there's a charge against the property, not the least of which is the phrase "covered into a special deposit in the name of and for the benefit of HTA." That's pretty clear.

And to Mr. Despins' point, as I mentioned in my opening argument, the 2015 amendments actually help us, because they clarify that the intent was always to transfer the beneficial interest in this property to HTA. And just to be clear, the transfer mandated by the statute, and it's mandated, isn't what creates the property interest. It reflects the fact that HTA is the proper owner from the get-go; that from the moment these taxes were created to be levied, they were created for the sole purpose of funding these bonds. That was the essence of the deal.

Now, Your Honor --

THE COURT: May I just ask you a question?

MR. ELLENBERG: Sure.

THE COURT: As to HTA and your position that future excise tax revenues, and excise tax revenues not delivered are within the scope of the lien, how do you reconcile that with 9 LPRA section 2015, which specifically precludes recourse to funds other than those pledged for the payments of such bonds

and interest thereon pursuant to the provisions of section 2004(L), which in turn provides for pledges of the proceeds of any tax or other funds which may be made available to the Authority by the Commonwealth?

MR. ELLENBERG: Your Honor, we start out with the proposition that all of the excise taxes to be collected are to be covered into a special account, separate from the General Fund, a special deposit separate from the General Fund, for the benefit of HTA. And so it's inherently a forward-looking commitment.

And these are special revenues. This is a classic municipal revenue bond deal where the bondholders look to the security of a future stream of revenues pledged by the municipality. And as Your Honor recognized in the last visit we had before you on the subject, 928(a) is in the Code to prevent 552(a) from cutting off the liens. And so, clearly, we have a lien on future revenues.

Now, Your Honor, I'd like to speak for a minute about the standard of proof.

THE COURT: So the "made available" language either doesn't mean anything or it's made available when it's covered into the special deposit?

MR. ELLENBERG: Yes. Exactly. But the other language in the statute clearly talks prospectively about future collections.

So, Your Honor, if I could talk for a moment about standard of proof. Mr. Bienenstock greatly misrepresented the standards set forth in *Grella*. And you of course can reach your own conclusions on that by reading the case. We don't really need to quibble much on that, because I think we meet whatever standard should be imposed subject to two principles.

One is that the Court is ultimately not ruling on the merits, but just seeing whether we have met some kind of standard of viability. And second, I don't believe the Court should be resolving disputed issues of fact in a plenary -- in a summary proceeding like this. We need a plenary proceeding with full discovery and full evidentiary rules if we're going to be deciding disputed issues of fact.

More importantly, Your Honor, I think Mr. Bienenstock also misstated what had to be proven. He said the question is we have to disprove that the Commonwealth has even a contingent residual interest in the assets. No. That's wrong. They do, but that's just one stick from the bundle. The rest of the bundle is transferred to HTA.

What we have to show is that we have a property interest in or a charge on the rest of the bundle. Clawback, again, is merely a contingent carve-out from our rights. It doesn't negate the existence of the rights.

THE COURT: Is he correct with respect to 362(d)(2), that you would have to show that the Commonwealth has no

equity? You would have to show a likelihood of disproving even that contingent, right?

MR. ELLENBERG: No, not at all, Your Honor. I don't think that's what that test means.

Obviously that's beyond the scope of this hearing. That will be addressed at the final hearing. But no, I completely disagree with that. And we are not trying to take that contingent right away from them. We fully recognize that if the circumstances permitting clawback ever occurred, and I need to stress there's no evidence that they ever have or ever will, but we don't deny that if they exist, clawback can be invoked.

Again, that's the deal we signed up to. We're not trying to get better rights than we signed up to. They're trying to take away the rights they agreed to give us in order to get us to give them five billion dollars.

Your Honor, if I could speak briefly about the pledges at the HTA level? Well, before I get to that, Your Honor, I would just like to stress that money at HTA not only includes the cash they've sent down there, but that it also includes Fund 278, which Ms. McKeen failed to mention includes unique subaccounts that are only for HTA funds and only these revenues ever went in there. And --

THE COURT: Mr. Ellenberg, that was your second beep, so do you intend to go on?

MR. ELLENBERG: Yes.

THE COURT: Okay.

MR. ELLENBERG: If I could, just for a minute or two, Your Honor.

So there are over two billion dollars credited to that account right now, and those monies have been received by HTA in all senses of the word.

Your Honor with respect to 601 and 401, Mr. Bienenstock said there's no pledge in 601. Well, on its face it says the funds are hereby pledged to the payment of the bonds. And Section 401 says, it is only for additional security. And Mr. Bienenstock is effectively reading the word "additional" out of Section 401 and making Section 601 surplusage.

Finally, Your Honor, we are perfected by UCC-1 filings, because the receivables are pledged to us, and those can be perfected by UCC-1. Moreover, the right to the receivables has been pledged to us, which Mr. Bienenstock says is what we need. And what he fails to look at is the Supplemental Security Agreement and the Supplemental Resolution 9808, both of which were adopted in connection with the 1998 bonds, which make clear that the lien extends to all funds required to be deposited in the Sinking Fund, not just the funds that actually are deposited in the Sinking Fund.

Thank you, Your Honor.

THE COURT: I have a couple of questions for you.

MR. ELLENBERG: Sure, Your Honor.

THE COURT: Do you have evidence that there was a resolution adopted with respect to the 2002 Security Agreement, which I think is what you just referred to?

MR. ELLENBERG: Yes, Your Honor. But the -- there is not a resolution, but it's also not necessary. The Board -- the management of HTA had authority to enter into that agreement without a bond -- without a Board resolution. 9808 is a properly adopted Board resolution.

THE COURT: And turning to CCDA, you argue in your papers that the grant of the relief you propose to seek in the enforcement action by way of mandamus would not infringe even on the Commonwealth's future contingent clawback rights. How can that be, since you are looking for a mandate to push through a cash flow ultimately ending at the bondholders and potentially within subportions of fiscal years?

MR. ELLENBERG: Your Honor, if you're asking about CCDA, with your permission, I'd defer that to Ms. Miller.

THE COURT: Okay.

MR. ELLENBERG: And I would just emphasize again that, as to HTA, we are only seeking our right to have the funds applied through the waterfall, and whatever falls out of the bottom, HTA gets to use.

THE COURT: Thank you.

MR. ELLENBERG: And historically, they've had over 400 million dollars available to them, per year.

Any other questions, Your Honor?

THE COURT: No. That's it. Thank you.

MR. ELLENBERG: Thank you very much.

MS. MILLER: Good afternoon, Your Honor. Atara Miller from Milbank on behalf of Ambac and movants.

Just one note, and I don't have the cite handy, but I believe that there actually is a resolution approving the 2002 closing documents. And we'd be happy to submit that to the Court, if the Court would accept it after the hearing.

THE COURT: Well, I would ask you to file it with an informative motion, and my consideration of it will be subject to any objection that the opponents may want to file in response to your informative motion.

MS. MILLER: Understood.

So I'm going to jump around. And I apologize for not having sort of an organized flow, but I'm going to try to respond quickly to the points that were raised.

The first point that I would like to discuss is Mr. Bienenstock stated we've never asserted a priority, so that we contend, as we did earlier, that that is irrelevant for now. But I want to make clear that we both have and the Puerto Rico District Court has found that we do have a priority, and that our priority is second only to the public

debt under the Puerto Rico Constitution and Puerto Rico law. And that's in the *Assured versus Garcia Padilla* case, 214 F.Supp. 3d 117.

With respect to clawback, I know Mr. Ellenberg touched on it briefly and noted that the Oversight Board argues that we don't have -- that they have a future contingent interest and therefore, it defeats our arguments. That's irrelevant to the question of whether or not we have a property interest.

The CCDA Pledge Agreement makes it most clear, because it requires the money expressly in the pledge account, which the Oversight Board concedes is subject to our lein, to be distributed first in the circumstance when clawback is triggered for the payment of the public debt. So there's no question that it's a condition of our lien, but that it doesn't actually affect our ownership.

We have ownership even though there's some reversionary interest potentially. And we think that that future contingent interest has not, as a matter of fact, been triggered with respect to historic funds, and is unlikely, particularly given our last dollars protection, to ever be triggered on a go-forward basis. And, you know, to the extent that the Commonwealth is contending otherwise, that would be a defense to the enforcement action which the Commonwealth would have to prove and which should be adjudicated there and not on

this motion.

The Oversight Board points to the impairment of the GO debt in the Plan. And we heard Mr. Bienenstock refer to that today as a justification for perpetual clawback, but impairment of the GO debt is irrelevant to the clawback analysis. Once the Proposed Plan becomes effective, and new bonds are issued, and they're being paid as required on a fiscal year by fiscal year basis the conditions of clawback will not be triggered.

The Plan itself also inverts Puerto Rico law and the express priority thereunder, because it assumes the payment of expenses first and then the amount payable for debt service, which is contrary to the order of priority set in Puerto Rico, both in the Constitution and the OMB Act, which is incorporated into that provision of the Constitution.

So the suggestion that monies will be paid to GO bondholders under the Plan, already clawback money doesn't save any clawback, which requires the analysis to be done on an annual basis and would permit clawback only of monies required in that year, which there's no proof that that's ever happened.

I want to talk for a minute about the language in the *Andalusian* decision which Mr. Bienenstock mentioned as support for the applica -- or for the nonapplication of the last antecedent clause principle. And I just want to -- you know,

the language there actually proves why it makes good sense to not apply it there, and it's similarly irrational to apply or to not apply the last antecedent canon in our case.

The definition there that was at issue was the contribution paid from and after the date hereof, and that are made by employers, and any assets in lieu thereof or derived thereunder which are payable to the system pursuant to various sections of the Enabling Act.

The first clause is the contributions paid from and after the date hereof that are made by the employers. That clause lacks specificity to the extent that if you don't have the further qualifying provision, there's a certain degree of vagueness and ambiguity about what that's referring to.

THE COURT: Ms. Miller.

MS. MILLER: Yes.

THE COURT: I'm sorry. I don't have the language right in front of me, but as I recall it, it said contributions made by the employers pursuant to specific sections of the Act, and it was only after that that the final sort of more comprehensive clause came in.

MS. MILLER: No. The language is cited in the decision at page 464. And the full language, which I'll just read it so you have the reference, it says, the resolution defines employer contributions as the contributions paid from and after the date hereof that are made by the employers, and

any assets in lieu thereof or derived thereunder which are payable to the system pursuant to Sections 2-116, 3-105 and 4-113 of the Enabling Act.

THE COURT: I'm sorry. I think I was thinking of a different clause. So --

MS. MILLER: And the question -- and the question there was whether it referred to both portions of that.

So then we heard for the first time from Mr. Bienenstock an argument that, frankly, we think is created from whole cloth and we've never heard before, that PRIFA is the owner of the Sinking Fund, which is just not right. I mean, as this Court held in the *Assured* special revenues decision at 582 B.R. 579, "a trust divides ownership of property, placing legal title with the trustee while the beneficiary enjoys an equitable interest."

And Section 405 of the Trust Agreement states that the Sinking Fund "shall be held in trust for the respective holders of such bonds." The suggestion, also, that it was required to be held or controlled by the trustee, because that's how you get perfection, is just belied by the fact that Section 1907, which is on slide 21 of the PRIFA deck, provides that all of the liens and pledges are automatically perfected. So there would have been no reason to run through contortions to get to perfection.

The flow of funds also clearly demonstrates it as a

U.S. bank account. It's reflected on slide 16, but also the original flow of funds as produced to us by the government parties are attached as Exhibit 36 to the Miller Declaration. And when I asked Mr. Ahlberg about what it means, what the yellow on the flow of funds means -- I said, and this is at Exhibit 26, 342, line six, I said, okay, and what does the yellow box indicate. And Mr. Ahlberg said, yellow box indicates an account that is not a Commonwealth or PRIFA account. There is no question that the Sinking Fund is not a PRIFA account.

The Infrastructure Fund, I mean, Ms. McKeen just totally made up what those accounts are. There's absolutely no evidence. In fact, she started out by saying, well, all the testimony is we have no idea what it is. It's an accounting principle. And yes, so yes, the accounting matters here. And that's what the infrastructure is, was, and always is.

And the notion that Mr. Ahlberg -- of course he said that it's the first -- just the first 117 million as earned, because that's what everybody always thought about in the good times. Well, that ignores the fact that Mr. Ahlberg had nothing to do with the Commonwealth until about a year ago, and that was certainly not good times when the money was just flowing.

With respect to the Lockbox Agreement, Bacardi's

counsel indicated that the Lockbox Agreement only shows prior practice. You know, when things were good, what were they doing. And that's just wrong. The Lockbox Agreement itself, as the Oversight Board points out in its brief, provides for the ability to change it and to modify the flow. And they just never have done that. So I think it's more than that. I think it's a clear acknowledgment that certainly, at the time before everything went sour, the Commonwealth fully recognized its obligations here.

With respect to CCDA and the question about, you know, what is the transfer account, and where is it, and Ms. McKeen made some comments about, you know, the logical inferences that we should be making, we obviously disagree with the logical inferences and think that the weight of the evidence supports us. In particular, this single fact that we have identifying an account and tying a bank account directly -- if I could just have 30 seconds to finish?

THE COURT: Yes.

MS. MILLER: Thank you. Identifies the account that they say is the transfer account as the surplus account. At a very, very minimum, we should get flow of funds information going back to 2006, when the initial bonds were issued, and then also in 2011, when they say that the Scotiabank account was established, because looking at the flow of funds from 2015 doesn't tell me a whole lot about anything.

So with that, unless Your Honor has any additional questions --

THE COURT: Let me just look at my notes for one moment.

MS. MILLER: Actually, I had one other quick point if the Court would indulge?

THE COURT: Yes.

MS. MILLER: So Your Honor asked Mr. Ellenberg about the "made available" language in the HTA statute, and in my mind, it's sort of corollary -- in the PRIFA statute, is 1906(m), which provides or defines what revenues PRIFA can mortgage or pledge. And there they don't use "made available" but they say "may receive".

And I think both of them mean the same thing, that may be made available by statute, or that they may receive by statute. And that has to be clear, because otherwise the very last -- the very end of that, which is, "which should have been transferred by Commonwealth to the Authority," doesn't make sense.

So it's clear that the "may receive" or "made available" doesn't mean actually transferred to them. It means that they got through the statutory grant.

THE COURT: Thank you.

Let's see. So the Oversight Board argues that a dispute over what the infrastructure is or any lien on the

Infrastructure Fund is ultimately irrelevant because without appropriation, no money goes into the Infrastructure Fund; and PRIFA wouldn't have a secured claim if the Infrastructure Fund is empty.

Do you have a response to that, other than that it is the Infrastructure Fund as soon as it hits the Commonwealth essentially?

MS. MILLER: Well, one of my basic responses to that is that the government precluded us from getting any discovery into their fund accounting, and so at this point in particular, I don't even know if that's a true or false assertion.

So all I know is that the monies, based on their testimony, continue to be recorded in exactly the same fund and account that they were previously; and that Mr. Ahlberg said that the funds are traceable through this combination of fund and account numbers; that they use the same fund and account numbers that they have always used; and that they previously publicly disclosed those monies as being in the Puerto Rico Infrastructure Fund.

THE COURT: Thank you, Ms. Miller.

I thank all of you for your arguments and for all of the work that you have put into putting me in a position to make a decision after this preliminary hearing that will then guide us in defining whether and to what extent further

proceedings on the Lift Stay Motions are necessary.

I take these motions under submission, and will issue written decisions as promptly as possible.

This concludes the hearing Agenda for the two-day Omnibus Hearing, which included this Lift Stay Motion hearing. The next scheduled hearing date is the July Omnibus Hearing scheduled for July 29th to 30th of this year. I expect that that hearing will occur telephonically as well, but I will issue a procedures order providing appropriate logistical details closer to that time, and we'll know more about how the world is operating closer to that time.

As always, I would like to thank the Court staff in Puerto Rico, in Boston, and in New York for their work in preparing for and conducting this hearing, and their superb ongoing support of the administration of these complex cases under very challenging circumstances, including challenging technological circumstances. So thank you to all of the court staff.

Counsel, is there anything else that we need to address together before we adjourn?

MS. MILLER: Nothing from us, Your Honor. Thank you.

THE COURT: Okay. I think I've waited long enough for unmuting. There's two more seconds there.

MS. NG: Judge, are you looking for me? I'm sorry.

THE COURT: No. No. I'm just waiting for any

counsel --

MS. NG: Okay.

THE COURT: -- who might have been unmuting themselves. But I think I have waited --

MR. BIENENSTOCK: Nothing from us either, Your Honor.

THE COURT: Okay. Thank you, Mr. Bienenstock.

All right. Stay safe and keep well everyone, and again, thank you. Good-bye.

MS. MILLER: Thank you, Your Honor.

MR. BIENENSTOCK: Thank you.

(At 3:24 PM, proceedings concluded.)

* * *

U.S. DISTRICT COURT)

DISTRICT OF PUERTO RICO)

I certify that this transcript consisting of 155 pages is a true and accurate transcription to the best of my ability of the proceedings in this case before the Honorable United States District Court Judge Laura Taylor Swain, and the Honorable United States Magistrate Judge Judith Gail Dein on June 4, 2020.

S/ Amy Walker

Amy Walker, CSR 3799

Official Court Reporter

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